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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

G.P.D., Inc.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, G.P.D., Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (App. B, *infra*, pp. 2a-9a), following the Board's Supplemental Decision is reported at 450 F.2d 963; the Board's Supplemental Decision, (App. C, *infra*, pp. 10a-12a), is reported at 179 N.L.R.B. No. 31. The Court's initial opinion remanding

the case to the Board, (App. D, *infra*, pp. 14a-32a), is reported at 406 F.2d 26; the Board's initial Decision and Order, (App. E, *infra*, pp. 32a-78a), is reported at 163 N.L.R.B. 830.

JURISDICTION

The judgment of the Court of Appeals, (App. F., *infra*, p. 79a), was entered on August 11, 1970. The timely petition of G.P.D., Inc. for rehearing *en banc* was denied on September 30, 1970 (App. A. *infra*, p. 1a). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after finding that an employer has committed unfair labor practices, the Board may properly refuse to consider the currently existing situation including the fact that all employees but one (seven out of eight) have been hired subsequent to the time of the unfair practices, and instead impose a bargaining order based solely upon the effects of the unfair labor practices on the employee complement as it existed at the time of the unlawful acts.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •;

• • • • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

• • • • •

Sec. 10 (c) • • • If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; • • •.

STATEMENT OF THE CASE

Petitioner, G.P.D., Inc. (hereinafter GPD), is a corporation engaged in the sale and distribution of automobile replacement parts and related products, having its principal place of business in Ferndale, Michigan. On August 31, 1965, GPD received a letter from the Teamsters, wherein that organization claimed to represent a majority

of GPD's driver-salesmen and warehousemen. GPD immediately replied to the Teamsters' letter, expressing doubt as to majority status and suggesting an NLRB election. A copy of that letter to the Teamsters was mailed to each of the GPD driver-salesmen and warehousemen, along with a cover letter of explanation. On September 2, 1965, the Teamsters filed an election petition with the NLRB.

Two employees were terminated during the following week. The discharges resulted in a strike in protest, and two of the strikers were later denied reinstatement. Unfair labor practice charges were filed and a complaint issued alleging wrongful discharges in violation of Sections 8(a)(1) and (3), of the National Labor Relations Act, threats in the letter of September 1 and in subsequent conversations in violation of Section 8(a)(1) and a refusal to bargain in violation of Section 8(a)(5). After a hearing, the Board found violations of Section 8(a)(1) by reason of threats in the letters and subsequent conversations, violations of Sections 8(a)(1) and (3) in the discharges and refusals of reinstatement (finding, however, that one of the dischargees had been offered reinstatement) and a violation of Section 8(a)(5) in refusing to bargain. (App. E, *infra*, pp. 33a-78a). The Board's Decision and Order directed GPD to cease and desist from violations of the Act, to reinstate three of the four discriminatees (the fourth having been offered reinstatement before hearing) and to bargain with the Teamsters.

Upon review, the United States Court of Appeals for the Sixth Circuit enforced only part of the Board's Order. Specifically, the Court ruled that GPD's September 1 letter constituted an unlawful threat of discharge only with respect to the two employees eventually discharged, and not, as the Board had ruled, an unlawful threat of discharge to all union adherents. The Court found no other

violations of Section 8(a)(1) in any of the statements of the Employer. Although the Court agreed that GPD had violated 8(a)(3) by discharging two employees and refusing to reinstate two others, it ruled that GPD had not refused to bargain in good faith, and set aside the Section 8(a)(5) finding of the Board. The case was remanded to the Board for consideration of the appropriate remedy for the discriminatory discharges and refusals of reinstatement and for the improper statements in the letter of September 1, 1965. (App. D, *infra*, pp. 14a-32a). GPD then offered reinstatement to the remaining three discriminatees and so advised both the regional office and the National Labor Relations Board (JA 7a)[1].

Upon remand, the National Labor Relations Board asked for and received Statements of Position from the various parties. (JA 2a, 4a, 12a, 16a, 20a). While the matter was pending before the Board, this Court issued its opinion in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Thereafter the Board asked for additional or Supplemental Statements of Position, in light of that decision. (JA 22a). Supplemental Statements were filed by General Counsel and by GPD in accordance with the Board's request. (JA 24a, 27a). In support of its Statement of Position, GPD filed an affidavit establishing the complete change in make-up of the bargaining unit, the fact that only one employee who was in the bargaining unit at the time the Teamsters attained majority status remained, and that all four of the discriminatees (the two dischargees and the two persons to whom reinstatement was refused) had subsequently been offered reinstatement, which offers were rejected. (JA 7a).

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[1] "JA" refers to the joint appendix in the Court of Appeals, a copy of which has been filed with the Clerk.

On October 16, 1969 the National Labor Relations Board issued its Supplemental Decision, in which it recited that the unfair labor practices committed by GPD were of such a pervasive character as to require a Bargaining Order to undo their unlawful effects, despite the subsequent employee turnover (App. C, *infra*, pp. 10a-12a). The Board stated, without supporting discussion, that the possibility of erasing the coercive effects of the unfair labor practices and holding a fair election by the use of traditional remedies, even if present, was so slight as to require a Bargaining Order to protect employee sentiment once expressed through the authorization cards. The Board therefore reaffirmed its Bargaining Order and requested enforcement.

Upon review of the Supplemental Decision of the NLRB, the Court of Appeals granted enforcement, with one Judge dissenting. (App. B, *infra*, pp. 2a-9a) GPD timely filed a petition for rehearing which, on September 30, 1970, was denied, again with one Judge dissenting. (App. A, *infra*, p. 1a).

REASONS FOR GRANTING THE WRIT

1. This case presents an important issue in the administration of the National Labor Relations Act: whether the NLRB may properly ignore current employment atmosphere and employee sentiment, and instead impose a bargaining order based solely upon the effects of unfair labor practices on an employee complement as it existed at the time of the unlawful acts. Additionally, it involves the proper interpretation and application of *NLRB v. Gissel Packing Co., supra*, to a situation in which there has

occurred substantial employee turnover between the time an unfair labor practice is committed and the time the NLRB issues its remedial order. The decision of the Board and the Court of Appeals' opinion resulted from an unwarranted extension of the holding in *Gissel*, where this Court issued its instruction to the Board as follows:

> "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . ."[3]

Under this standard, as viewed by Judge McCree in his dissent in this case, the Board must, at the time it issues or reaffirms a bargaining order, determine whether the electoral atmosphere is still so contaminated by the employer's earlier unfair labor practices that a fair election is unlikely.[5] The Board, however, has taken and adheres to the position that it need give no consideration whatever to employee turnover when deciding to issue bargaining order.[4] As expressed by the Board in its petition for certiorari in *NLRB*

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[3] 395 U.S. at 614.

[5] App. B, *infra*, p. 7a.

[4] NLRB v. Lou DeYoung's Market Basket, Inc., 430 F.2d 912 (6th Cir. 1970), *enforcing*, 181 N.L.R.B. No. 10; Gibson Products Co., 185 N.L.R.B. No. 74 (August 27, 1970); Henry Colder Company, 181 N.L.R.B. No. 58 (June 30, 1970); U-Tote M of Oklahoma, 179 N.L.R.B. No. 141 (December 2, 1969); Vaca Valley Bus Lines, 179 N.L.R.B. No. 107 (November 19, 1969). See also, NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir., 1970), *cert. den.* — U.S. — (1970); Clark's Gamble Corp. v. NLRB, 422 F.2d 845 (6th Cir., 1970), *cert. denied*, — U.S. — (1970) (Justices Black, White and Blackmun dissenting); NLRB v. L. B. Foster Co., 418 F.2d 1 (9th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

v. *American Cable Systems, Inc.*, No. 737,[5] it refuses to consider employee turnover and instead evaluates the propriety of a bargaining order in terms of the effect of the employer's unfair labor practices on the employee complement as it existed at the time of the unlawful acts.

This position reflects an improper interpretation of the above-quoted language of this Court in *Gissel*, and ignores the further teaching of this Court that an election is the preferred method for establishing a union's representative status.

The *Gissel* decision has led to a flood of bargaining orders by the NLRB.[6] The appropriateness of such bargaining orders is a matter of serious concern not only to employers but to the employees whose representation is at issue. The National Labor Relations Act was designed to protect employees, not unions. It was designed to prevent interference with commerce caused by industrial strife by "prescrib[ing] the legitimate rights of both employees and employers in their relations affecting commerce, . . . provid[ing] orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, . . . protect[ing] the rights of individual employees in their relations with labor organizations. . . ."[7]

The need for a ruling by this Court on the precise issue at hand is apparent from the number of recent cases in which

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[5] The Board therein sought review of NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970). Certiorari was denied on December 14, 1970.

[6] See, *e.g.*, Elmhurst Foods, Inc., 185 N.L.R.B. No. 109, (Oct. 7, 1970); Wilder Mfg. Co., 185 N.L.R.B. No. 76, (August 27, 1970); Beaver Bros. Bolting Co., 182 N.L.R.B. No. 122 (May 27, 1970); Merritt Motor Company, 181 N.L.R.B. No. 172, (April 14, 1970); Wilson Furniture Co., 181 N.L.R.B. No. 14, (Feb. 10, 1970); J. H. Rutter-Rex Mfg. Co., 180 N.L.R.B. No. 123, (Jan. 22, 1970); Louisburg Sportswear Co., 180 N.L.R.B. No. 144, (Jan. 15, 1970); Hoch's, Inc., 180 N.L.R.B. No. 82, (Jan. 2, 1970); Hoch's, Inc., 180 N.L.R.B. No. 64, (Dec. 16, 1969).

[7] Section 1(b) National Labor Relations Act, as amended.

substantial employee turnover has been rejected by the Board as an argument against the propriety of a bargaining order.[8] Additionally, it is reasonable to assume that employers will continue to challenge the Board's refusal to consider the contemporary need for bargaining orders and its mechanical reliance upon past unfair labor practices when issuing such orders especially in light of uncertainty created by the disagreement among Circuits.

2. There is at present a clear conflict between the decision in this case and the position taken by the United States Court of Appeals for the Fifth Circuit, as evidenced by the latter Court's Decision in *NLRB v. American Cable Systems, Inc., supra.* In the instant case, the Sixth Circuit purported to rely on *Gissel* and rejected the Employer's argument "that a bargaining order is not justified . . . because of the four and one-half years of litigation which has followed the initial organization of its employees, there has been a nearly complete turnover of its employees."[9] The Fifth Circuit in *American Cable, however,* felt that "the Court in *Gissel* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such

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[8] See note 4, *supra.* See also NLRB v. Magnesium Casting Co., 427 F.2d 114 (2d Cir. 1970), *cert. granted,* — U.S. — (1970) (No. 370). There the Second Circuit enforced a bargaining order despite substantial turnover of employees. The Court gave recognition, however, to the relevance of employee turnover by referring to its pre-*Gissel* holding in NLRB v. Better Val-U Stores of Mansfield, Inc., 401 F.2d 491 (2d Cir. 1968). There the Court commented:

> The employees affected by the presently issued bargaining order are those currently at work and they should not be deprived of their freedom of choice among competing unions without clearer evidence the impracticality of an election to be held now, or of evidence that the employer refused to bargain with representatives of Local 371 at an earlier date.

Id. at 495.

[9] App. B, *infra*, p. 3a.

an order it finds the electoral atmosphere unlikely to produce a fair election."[10] The Fifth Circuit denied enforcement and remanded the case to the Board specifically because "the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the company's [earlier] waywardness."[11] The Court felt such findings were insufficient under the teachings of *Gissel* to justify a bargaining order.

Insofar as this case permits the Board to ignore employee turnover and the contemporary necessity for a bargaining order, it is in absolute conflict with *American Cable*.

2. There is also at present an apparent conflict between the decision in this case and the Sixth Circuit's earlier decision in *NLRB v. Clark's Gamble Corp.*[12] In that case, the Court of Appeals directed the Board to assess employee turnover, and further ruled that if there had been a "substantial" turnover the Board *must* order a rerun election, not bargaining.

The majority in the decision in this case attempts to distinguish *Clark's Gamble* by stating that there the Board's own delay had occasioned the turnover among employees.[13] But the decision in the present case and that in *Clark's Gamble* are not so easily distinguishable. There is no basis whatever in the record in this case for the Court's statement that G.P.D.'s violations of the National Labor Relations Act caused the turnover of employees and the delay

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[10] 437 F.2d, at 462.

[11] *Id.* at 462-63.

[12] Supra, n.4.

[13] App. B, *infra*, p. 4a. *See also* NLRB v. Lee DeYoung's Market Basket, Inc., *supra*, n.4, in which Judges Edwards and Celebrezze (with Judge Phillips) reaffirmed their position that *Clark's Gamble* should be applied only to cases in which the Board itself has occasioned the delay.

involved. The NLRB failed to take testimony after remand by the Sixth Circuit and therefore there is nothing in the record which permits any such finding whatsoever. Moreover, the erroneous first decision by the Board, much of which was denied enforcement by the Sixth Circuit, was of course at least a partial cause of the delay.[14]

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should be granted.

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[14] Judge McCree, who understandably dissented in the instant case, was on the panel that decided *Clark's Gamble*. The Sixth Circuit there noted that *Gissel* did not consider the issue of whether intervening employee turnover justifies refusal to enforce an otherwise warranted bargaining order. The Sixth Circuit reaffirmed its prior order, (reported at 497 F.2d 199 (6th Cir. 1969)), that the National Labor Relations Board determine whether a bargaining order is yet the appropriate remedy:

> Specifically, the Board is enjoined to determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made. If such change is found to have been substantial it is directed that the Board cause a representation election to be conducted.

Id. at 202.

The Board, too, recognizes the conflict between *Clark's Gamble* and the instant case. See the Board's petition for writ of certiorari in NLRB v. American Cable Systems, Inc., No. 737, p. 9, n.5.

APPENDIX A

No. 19,963

UNITED STATES COURT OF APPEALS
for the Sixth Circuit
G.P.D., INC.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

ORDER

(Filed September 30, 1970)

Before: Edwards, Celebrezze and McCree, Circuit Judges.

Petition for Rehearing filed in the above-styled case, along with a suggestion of rehearing en banc, having been referred by the Court under its rules to the panel which heard the case;

Said petition is hereby denied, with Judge McCree dissenting.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk

APPENDIX B

No. 19,963

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

G.P.D., Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition to Review and Set Aside and on Cross-Application for Enforcement of a Supplemental Order of the National Labor Relations Board

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Decided and Filed August 11, 1970.

Before: Edwards, Celebrezze and McCree, Circuit Judges.

Edwards, Circuit Judge. This is a petition to review and a cross-petition to enforce a supplemental order of the National Labor Relations Board. 179 N.L.R.B. No. 31. In its original opinion, *G.P.D., Inc. v. NLRB*, 406 F.2d 26 (6th Cir. 1969), the court (with one judge dissenting) enforced several provisions of the Board's order and remanded the portion of the order of the Board requiring bargaining. The remand provided:

> "The Board's order is enforced with respect to the Section 8(a)(1) violation to the extent hereinbefore approved, and is enforced with respect to the Section 8(a)(3) violations. However, enforcement is denied with respect to the other Section 8(a)(1) violations and the Section 8(a)(5) violation; and the case is remanded for further consideration of the proper remedial order."

The Board has now reconsidered the record. It was not asked to take and took no additional evidence, but at the Board's invitation the parties filed several statements of position. In the meantime (after the remand but before the additional briefing), the *Gissel* case *(NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)) was decided. Weighing its decision against the standard of that case, the Board found that unfair labor practices had been committed "that interfere with the election processes and tend to preclude the holding of a fair election." *NLRB v. Gissel Packing Co., supra* at 594. The Board again entered a bargaining order and herein seeks enforcement of same.

G.P.D.'s basic contentions are that a bargaining order is not justified because there is no threat that its prior illegal conduct will recur and because in the four and one half years of litigation which has followed the initial organization of its employees, there has been a nearly complete turnover of its employees (seven new employees out of eight). G.P.D. protests the bargaining order as being unfair to its new employees. G.P.D. relies heavily upon this court's opinions in *Clark's Gamble Corp. v. NLRB*, 407 F.2d 199 (6th Cir.), *vacated and remanded*, 396 U.S. 23 (1969), *affirmed* 422 F.2d 845 (6th Cir. 1970), *petition for cert. filed*, 38 U.S.L.W. 3510 (U.S. June 15, 1970) (No. 1697).

As we read this record, there is no justification for any of these arguments. G.P.D. responded to the organization of its employees (seven out of eight of whom joined the union and signed representation cards) by a classic pattern of violations of the National Labor Relations Act. Included therein were the illegal discharges of four employees (a majority of the union adherents and half of its working force). The purpose of the remedial powers given by Congress to the NLRB is to provide remedy for violations of the Act by re-establishing as nearly as possible the status quo ante *(before* the violations took place). G.P.D. in effect asks this court to reward its illegal conduct by relating the bargaining decision to the status quo post (*after* the illegal discharges and replacements).

Nor can G.P.D. properly rely upon the *Clark's Gamble* case. The court there reasoned that where the Board's own delay had occasioned the turnover of employees, the Board should decide whether or not a fair election could be held with the new group. Regardless of the merits of that decision, it can hardly be deemed applicable to a record such as this where G.P.D.'s own willful and gross violations of the NLRA directly caused both the turnover of employees and the delay.

As we see the matter, the United States Supreme Court itself has recently and unanimously answered all of G.P.D.'s arguments:

> "Remaining before us is the propriety of a bargaining order as a remedy for a (§8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election

to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB v. Katz*, 369 U.S. 736, 748, n. 16 (1962); *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' *Frank Bros., supra*, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true undistorted desires.

"The employers argue that the Board has ample remedies, over and above the cease-and-desist order to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read notices to employees during plant time and to give the union access to employees during working time at the plant, or it can seek a

court injunctive order under § 10 (j) (29 U.S.C. § 160 (j)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' § 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign. There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, in finding that a bargaining order involved no 'injustice to employees who may wish to substitute for the particular union some other . . . arrangement,' a bargaining relationship 'once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,' after which the 'Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.' *Frank Bros., supra, at 705-706.*" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-613 (1969).

(Footnotes omitted.)

The petition for review is denied.

We grant enforcement of the order of the NLRB.

McCree, Circuit Judge (dissenting). I respectfully dissent. Although in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court approved the Board's use of bargining orders to remedy an employer's unfair labor practices, the Court nevertheless made it clear that an election was the preferred method for establishing a union's representative status. The Court recognized the appropriateness of bargaining orders in those situations where "the possibility of erasing the effects of past practices and of *ensuring a fair election* (or a fair rerun) by the use of traditional remedies, though present is slight. 395 U.S. at 614 (emphasis added).

Under this standard, I believe it was incumbent upon the Board to determine whether at the time it reaffirmed the bargaining order, the electoral atmosphere was still so contaminated by the company's earlier unfair labor practices that a fair election was unlikely. The Board contends that it made this determination. However, it did so on the basis of the pre-remand record containing evidence of conditions only as they existed at the time of the hearing conducted by the Trial Examiner in 1966. No new hearing was conducted, nor was any new evidence adduced, following our remand order.[1] As the Fifth Circuit observed in a similar case, "the Board refused to look at the contemporary necessity for [a bargaining] order, satisfying itself with a jejune regurgitation of the Company's [earlier] waywardness." *N.L.R.B. v. American Cable Systems, Inc.*, 62 CCH Lab. Cas. ¶10,781, at 18574 (5th Cir. Mar. 30, 1970).

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[1] In this regard I observe that I do not nor apparently did the Board consider the parties "statements of position" evidence.

Yet, in the interim between the Board's original order in this case and its supplemental decision, a nearly complete turnover in the composition of the company's workforce had occurred. Seven new employees had been hired, and only one employee who had been part of the bargaining unit at the time the company committed its unfair labor practices remained. Moreover, a period of approximately two and one-half years had elapsed.

I cannot understand how the Board could determine at the time of its supplemental decision that the possibility of "ensuring a fair election . . . by the use of traditional remedies, though present, [was] slight," when it received no evidence concerning contemporary conditions at G.P.D., Inc., Furthermore, I think that only by considering evidence of existing conditions could the Board properly discharge its obligation to promote the Congressionally stated purpose of guaranteeing the rights of *employees* "to bargain collectively through representatives of *their own* choosing." Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157 (emphasis added).

Of course, I do not suggest that merely because there had been a turnover in employees and a substantial amount of time had elapsed since the Board's original order that the ill effects of the company's earlier unfair labor practices necessarily had been dissipated. *Cf. N.L.R.B. v. Katz*, 369 U.S. 736, 748 n. 16 (1962). Indeed, evidence adduced at a hearing might have demonstrated that the employee turnover was the result of a company purge of union adherents, in which case a bargaining order would be justified. I dissent only because the Board received no evidence of the presently existing situation and the present possibilities for a fair election. *See N.L.R.B. v. American Cable Systems, Inc., supra.*

Board orders are entitled to enforcement only if they are "supported by substantial evidence on the record considered as a whole". Section 10(e) of the National Labor Relations Act, as amended 29 U.S.C. §160(e); *Universal Camera Corp. v. N.L.R.B.* 340 U.S. 474 (1951). In light of the Board's procedure in the present case, there is not only a lack of substantial evidence, there is for all practical purposes, no evidence to support the bargaining order. Accordingly, I would deny enforcement and again remand this case to the Board for further proceedings.

APPENDIX C

United States of America

Before The
NATIONAL LABOR RELATIONS BOARD

Case 7-CA-5321

G. P. D., Inc.
and
Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind.

SUPPLEMENTAL DECISION

On April 3, 1967, the National Labor Relations Board issued a Decision and Order,[1] finding that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act, and ordering the Respondent to cease and desist therefrom and take certain affirmative action.

On January 17, 1969, the United States Court of Appeals for the Sixth Circuit issued a Decision, enforcing the Board's Order in part, but denying enforcement and remanding as to the balance.[2] The Court enforced in full the parts of the Order relating to the Section 8(a)(3) violations (the discriminatory discharges of Joseph Paladino and Michael Zamm, and the refusal to reinstate on appli-

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[1] 163 N.L.R.B. 330.

[2] *G.P.D., Inc. v. N.L.R.B.*, 406 F.2d 26.

cation unfair labor practice strikers George Morris and Leonard W. Andrus), and also enforced the Section 8(a)(1) Order based on certain of the violations (threats of discharge). But the Court denied enforcement of the parts of the Order relating to the Section 8(a)(5) violation, on the ground the Union did not offer the Respondent proof of its card majority (7 cards in an 8-employee unit), and the Respondent's refusal to bargain without an election was thus lawfully predicated on its good-faith doubt concerning the Union's majority.

At the same time, the Court recognized that a bargaining order might be an appropriate remedy for the Respondent's unfair labor practices, and it accordingly remanded the case to the Board for further consideration of the proper remedial order.

On May 19, 1969, the Board issued and served on the parties a Notice that the parties file statements of position with respect to the issues remanded by the Court. The Respondent and the General Counsel filed statements pursuant to the Notice.

On June 16, 1969, the United States Supreme Court issued its opinion in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, in which it laid down certain guidelines relative to the propriety of bargaining orders to remedy violations of the Act.

On August 14, 1969, the Board issued a Supplemental Notice that, having decided to reconsider the bargaining order in the light of *Gissel*, it requested that the parties file statements of position with respect thereto. The Respondent, the Union, and the General Counsel filed statements pursuant to the Supplemental Notice.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has

delegated its powers in connection with this case to a three-member panel.

The Board having reviewed the entire record pursuant to the Court's remand and having considered the parties' statements filed in response to the Board's Notice and Supplemental Notice herein makes the following additional findings and conclusions.

In the instant case the evidence indicates, as the Court of Appeals stated in its Decision, that seven out of the eight unit employees signed valid authorization cards designating the Union as their collective-bargaining representative. The evidence further indicates, as Circuit Judge Edwards expresely pointed out in his separate opinion, that the Respondent thereupon engaged in gross unfair labor practices, including unlawful threats to and the discriminatory firing of four of the eight employees in the unit. In our opinion these unfair labor practices were such an egregious and pervasive character as to require that even in the absence of a Section 8(a)(5) violation, and despite the subsequent employee turnover, a bargaining order to undo their unlawful effects[1] in a manner sufficient to effectuate the policies of the Act. Moreover, we are of the opinion, and find the possibility of erasing the coercive effects of these unfair labor practices and ensuring a fair election by the use of traditional remedies even if present, is so slight as to lead to the conclusion that the employee sentiment expressed through the authorization cards would on balance be better protected by the bargaining order heretofore issued as paragraph 2(a) of our Order.

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[1] *N.L.R.B. v. Gissel Packing Company*, supra at 615 (Sinclair Co., No. 585).

We accordingly reaffirm, and request the Court to enforce our bargaining order as heretofore issued.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

APPENDIX D

No. 17860

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

G.P.D. Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition to Review and Set Aside and Cross-Petition to Enforce Order of NLRB.

(Filed Jan. 17, 1969)

Decided January 17, 1969.

Before: Edwards, Celebrezze, and McCree, Circuit Judges.

McCree, Circuit Judge. This case is before us on petition to review and set aside, and on cross-petition to enforce, an order of the National Labor Relations Board. The Board's Decision and Order are reported at 163 NLRB No. 114. Petitioner, a Michigan corporation having its principal place of business in Ferndale, Michigan, is engaged in the sale and distribution of automobile replacement parts to Ford dealers. The controversy is the result of the Union's[1]

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[1] Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

attempt to obtain recognition as the exclusive bargaining agent of the Company's driver-salesmen and warehousemen. These two groups concededly constitute an appropriate bargaining unit.

In August, 1965, employee Joseph Paladino conferred with Jerome Coleman, an organizer and business agent of the Union, and they eventually arranged a meeting of the employees for the evening of August 27. This meeting was attended by eight of the Company's employees[2] and seven[3] of them signed cards authorizing the Union to act as their collective bargaining representative.

On August 31, Mr. Emmet Tracy, the president and treasurer of the Company and a principal stockholder, received a letter from the Union demanding recognition for the purpose of collective bargaining. The letter stated:

> Dear Sir:
>
> This is notify [sic] you that a majority of your employees in the collective bargaining unit described below have designated Teamsters Local 337 as their exclusive collective bargaining representative. In view of such designation, we demand recognition, for purposes of collective bargaining, as the exclusive representative of such employees. The collective bargaining unit in which we demand recognition consists of drive-salesmen and warehousemen.
>
> Please advise this office if and when it is possible for a meeting to be held for the purpose of negotiating a collective bargaining agreement.

---

[2] All the warehousemen and driver-salesmen except one were in attendance. In addition, Charles Markos, a former warehouseman who was transferred to a clerical position was present.

[3] Markos also signed a card but his was not considered in determining the Union's majority.

In the event of any discrimination against any of your employees because of their union activities, or in the event of your refusal to bargain with us, we will take prompt action to remedy such discrimination or refusal to bargain.

Very truly yours,

Jerry Coleman
Business Representative
Teamsters Local 337

The next day Mr. Tracy responded to the Union's letter as follows:

Attention: Mr. Jerry Coleman

I have received and read with interest your letter of August 30 which was forwarded to me at Harbor Point and as I do not want any time to intervene before the contents of your letter becomes known I am replying promptly.

As you may know our business is seasonal and for the past five or more years we have employed only two or at most three men in our warehouse during eight or nine months of the year. During the summer months we must provide replacements for our salesmen during their vacation periods and prior to and during this period we hire temporary help for the summer months.

It would not be surprising if some or all of the temporary help in anticipation of permanent employment would have contacted your offices for organizing assistance.

These temporary workers all of whom will be released before September 15, 1965, as the summer

season will then be over may favor your organization, but I am confident that the balance of our regular employees are not interested in having you or any other organization representing them.

When you consider the bulk if not all of the Ford Dealers Salesmen and Parts Men on whom our salesmen depend for sales and their livelihood have expressed on many occasion their desire not to be unionized their probable reaction to unionization of our company is almost certain to be detrimental to the sales of our company and the sales and compensation of our commission salesmen.

Because of these conditions over which we have no control it could be a very expensive experiment for our permanent employees and as you know, one from which there could be no retreat once the news was out in the hands of the Dealers and their probable reaction determined.

The value of outside assistance to the employees of an organization having only two or three warehouse employees and three or four outside commission salesmen is at the least very questionable although I would not expect you to agree.

I am attaching a copy of a letter mailed today to all employees for your information.

If you really believe you represent a majority of our permanent employees I would suggest that you arrange to have the National Labor Relations Board schedule an election to determine the accuracy of your claim.

Very truly yours,

E. E. Tracy

As the letter recites, a copy was sent to each of the Company's employees.

Following the receipt of this letter, the Union, on September 2, filed a petition with the Board requesting certification as the representative of the driver-salesmen and warehousemen. However, because of the subsequent filing of unfair labor practice charges, there have been no further proceedings pursuant to this petition for an election.

On September 7, Mr. Tracy separately interviewed at least five employees, including Raymond Horne, Michael Zamm and Joseph Paladino. During the interview with Horne, he stated that anyone carrying a union card probably could not get a job as a Ford Motor Company representative. During the interviews with Zamm and Paladino, he informed them that they were to be discharged. Zamm's employment was terminated on September 7 and Paladino's the next day.

These discharges precipitated a strike by the Company's employees which began about September 9. Of the seven employees who went on strike, three returned to work during the last week of October. On November 23, Union agent Coleman sent a telegram to the Company requesting the reinstatement of the remaining four employees (this group included Zamm and Paladino) and informing the Company that they would report for work on November 29. None of the four reported on the 29th, but three of the four (Morris, Andrus and Paladino) did subsequently contact the Company and discuss the question of reinstatement. Their efforts, however, were unsuccessful.

This series of events formed the basis for alleged violations of Sections 8(a)(1), 8(a)(3) and 8 (a)(5) of the National Labor Relations Act as amended, 29 U.S.C. §§158(a)(1), 158(a)(3) and 158(a)(5). The trial examiner found

that petitioner violated Section 8(a)(1) of the Act by threatening in its letter of September 1 to discharge employees engaging in union activity; by predicting in the same letter a loss of sales and the concomitant loss of commissions for the driver-salesmen as a result of unionization; and by threatening employee Horne with blacklisting with respect to securing employment at the Ford Motor Company. He also found that petitioner violated Sections 8(a)(3) and 8(a)(1) of the Act by discriminatorily discharging Zamm and Paladino, and by refusing to reinstate employees Morris and Andrus. Finally, he found that petitioner violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to recognize and bargain collectively with the Union.

The trial examiner recommended that the Company cease and desist from its violations of the Act. As affirmative relief, he recommended that, upon request, the Company bargain collectively with the Union; that it offer to employees Zamm, Morris and Andrus reinstatement and make them whole for any loss of earnings; and that it make employee Paladino whole for any loss of earnings suffered up to December 1, 1965.[4]

The Board affirmed the findings of the trial examiner and adopted his recommended order. Upon consideration of the record as a whole, we conclude that there is substantial evidence to support the Board's finding of a Section 8(a)(1) violation to the extent hereinafter pointed out. We also find substantial evidence to support their decision with respect to the Section 8(a)(3) violations. We do not, however, find substantial evidence to support the Board's decision with respect to other Section 8(a)(1) violations and the Section 8(a)(5) violation.

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[4] The examiner found that as of December 1 the Company had offered to reinstate Paladino to the same job he had held prior to his discharge and that Paladino had refused this offer. The discrimination against him therefore ended as of that date.

Section 8(a)(1)

In his letter of September 1, Emmet Tracy asserted that the Company's business was "seasonal" and that it was probably the "temporary" employees, all of whom were to be discharged prior to September 15, who had contacted the Union. The Board construed his language as a warning to *all* employees that they would be dismissed if they engaged in Union activity. This was based on the fact that, contrary to the petitioner's assertion, there was no evidence indicating that its business was "seasonal" or that it hired "temporary" help during the summer months. None of the driver-salesmen or warehousemen working for the Company during the organization campaign had been told they were temporary employees and four of them testified that they had no knowledge of any such Company policy.[5]

We agree with the Board's finding that the letter constituted an unlawful threat of discharge. However, we do not agree that it was directed at *all* of the employees who supported the Union. There is nothing, except the Board's interpretation of the "underlying meaning" of the letter, which supports a finding that the threat was so all-encompassing. To the contrary, the letter alludes to "replacements . . . *for the summer months*" and would therefore seem to be aimed only at those employees who had been hired just prior to the summer. No employees other than Zamm and Paladino fit this description and thus, although the letter contained an unlawful threat of discharge, it was directed solely at them.

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[5] Although one employee testified in support of Tracy's assertion, the trial examiner discredited his testimony because it was "vague and indefinite."

The issue with respect to the threat of lost commissions as a result of unionization is whether Tracy's assertion was a coercive warning or merely a prediction. It is well-settled that "the prediction of unfavorable consequences resulting from unionization is not a violation of the Act, provided that it is a prediction of such consequences, rather than a threat on the part of the employer to visit such consequences upon the employees in the event of unionization." *Supremant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756 (6th Cir. 1965). *See also, Union Carbide Corp. v. N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962).

In determining that Tracy's statements were illegal threats, the Board relied on *International Union of Elec. Workers v. N.L.R.B.*, 289 F.2d 757 (D.C. Cir. 1960). Prior to the *IUE* case, the general rule was that an employer's prediction of unpropitious economic consequences in the event of unionization was illegal only when it was within the employer's power to effect those consequences. *N.L.R.B. v. Nabors*, 196 F.2d 272, 276 (5th Cir. 1952), *cert. denied*, 344 U.S. 865 (1953). The D.C. Circuit broadened this rule in *IUE* and held that, despite an employer's inability to personally carry out a prediction of dire consequences, a categorical assertion that "third parties, who had [the] power, had already determined to exercise it", was also an illegal threat when there was no "reasonable basis" for a belief in the truth of the assertion. 289 F.2d at 763.

We think the Board's reliance on this decision is misplaced. Tracy did not "categorically" assert that Ford dealers had decided to refuse to deal with his driver-salesmen if they became unionized. To the contrary, he expressed his opinion in terms of the "probable reaction" of those dealers. Moreover, Tracy's prediction was not "drawn from thin air", since there had been abortive attempts to

organize Ford dealers in the territory served by his salesmen. *See John Mach Ford Sales, Inc.*, 7-RC-7491 (NLRB); *Russ Dawson Ford*, 7-RC-7645 (NLRB); *O'Green Ford*, 7-RC-7627 (NLRB). Thus, we find that Tracy's statement was no more than his prediction of a probable consequence over which he had no control, and as such was within the free speech guarantee of Section 8(c), 29 U.S.C. §158(c). *See N.L.R.B. v. Transport Clearings, Inc.*, 311 F.2d 519, 524 (5th Cir. 1962).

Similarly, Tracy's statements to employee Horne were couched in terms of a probable consequence of union membership and were not unqualified assertions that such membership would foreclose employment opportunities at Ford Motor Co. Indeed, Horne testified that Tracy's statement was "just brought up as an example" of what "probably" would happen if he applied for a job at Ford. Thus, the *IUE* decision is again distinguishable. Also distinguishable is *Leeds Shoe Store*, 149 N.L.R.B. 500 (1964), which was cited by the Board. There the employer's statement, unlike that involved here, was characterized as an assertion that those who joined the union *could not* thereafter obtain work at retail stores. We therefore find that Tracy's statement to Horne was also a legitimate prediction and did not violate Section 8(a)(1). *Cf. Seidmon, d/b/a Southwester Co.*, 111 N.L.R.B. 805 (1955).

Section 8(a)(3)

Upon consideration of the record as a whole, we find that there is substantial evidence to support the Board's decision that Zamm and Paladino were discharged because of actual or suspected Union activity and that these discharges therefore violated Sections 8(a)(3) and 8(a)(1) of the Act. As stated earier, there was no credible

evidence introduced to establish the Company's contentions that its business was seasonal and it hired temporary help during the summer. Even more significant is the fact that neither Zamm nor Paladino had ever been informed that he had been hired on a "temporary" basis. Indeed, both had been complimented on their performances and had been given raises during their periods of employment. Finally, the timing of the discharges and the absence of any evidence of a decrease in the Company's business at the time are also factors supporting the finding of an improper purpose on the part of the Company.

Since the discharges were unlawful, the employees' strike to protest them was an unfair labor practice strike. The striking employees were therefore entitled to reinstatement to their former, or substantially equivalent, positions upon their unconditional offers to return to work.[6] *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956); *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964). The Company acknowledges its obligation to reinstate, but contends that neither Morris or Andrus ever made a *bona fide* request to return to work.

No special procedure must be followed in applying for reinstatement and generally it is a question of fact whether such an application has been made. The Board found that Morris and Andrus asked the Company if they could return to work and there is substantial evidence in the re-

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[6] Of course, as to the discriminatorily discharged employees, Zamm and Paladino, the Company was obligated to offer reinstatement regardless of whether they applied for it. *See R. J. Oil & Refining Co.*, 108 N.L.R.B. 641 (1954); *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951). The Company did offer Paladino his former job, but Paladino rejected the offer. *See* note 4, *supra*. No offer, however, was ever made to Zamm and the Board's order therefore required that such an offer be made.

cord to support this finding. It is undisputed that Andrus met with Tracy in early December of 1965 and stated his desire to return. Tracy's response was an offer of a job not substantially equivalent to that previously held by Andrus. Although Morris never discussed his return with Tracy personally, he did call Tracy's son, the warehouse manager, and asked him whether he could come back to work. Tracy's son said he would have to discuss it with his father and that he would let Morris know. No one from the Company ever called Morris after that with respect to reinstatement. Therefore, the Company unlawfully refused to reinstate both Andrus and Morris in violation of Section 8(a)(3).

Section 8(a)(5)

The Board found that the Company refused to recognize and bargain collectively with the Union in order to obtain time within which to undermine the Union's majority and not because of any good faith doubt it entertained. Based on this violation of Section 8(a)(5) the Board ordered the Company to bargain collectively with the Union upon request.

When a union has obtained valid authorization cards from a majority of the employees in an appropriate bargaining unit, an employer violates Section 8(a)(5) if, without a good faith doubt, he responds to the union's bargaining demands by insisting on an election.[1] *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920-21 (6th Cir. 1965); *N.L.R.B. v. Winn-Dixie Stores*, 341 F.2d 750, 755 (6th Cir. 1965), *cert. denied*, 382 U.S. 830 (1965). The General Counsel, however, has the burden of proving the employer's lack

[1] In his letter of September 1, Mr. Tracy suggested that an election be held to test the Union's claim of majority status.

of good faith. *Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812, 818 (6th Cir. 1968); *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 206 (2nd Cir. 1967). We find that in the instant case the General Counsel has failed to sustain this burden.

In its letter to the Company demanding recognition, the union gave no indication that it was prepared to verify its majority status. Although it asserted that a majority of the Company's employees had designated the Union as their bargaining agent, it did not reveal the number of authorization cards it possessed, nor did it offer to substantiate the existence of the claimed majority by means of a card check. Under these circumstances we believe the Company's suggestion of an election was an appropriate response and that, contrary to the Board's contention, it was justified in questioning the Union's claim of majority status.

The Board, citing *N.L.R.B. v. C.J. Glasgow Co.*, 356 F.2d 476, 479 (7th Cir. 1966), contends that the Company's failure to take action to attempt to verify the Union's claim is evidence of its bad faith. However, in *C.J. Glasgow*, the company involved made *no* reply to the Union's demand for recognition. Here the Company responded by suggesting an election, the statutory verification procedure.[8]

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[8] It is also significant that the Seventh Circuit's reference to the company's failure to act was made in the following manner:

> Here there is no evidence of probative value to justify good faith doubt. In addition to its failure to reveal any reason for their "belief" the record discloses no action upon the part of Glasgow . . . to attempt to verify the Union's claim. . . . 356 F.2d at 479.

The Seventh Circuit apparently imposes the burden of establishing a good faith doubt on the company as opposed to the rule of this Circuit, and others, whereby the General Counsel has the burden of establishing a lack of good faith. *See Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812, 818 (6th Cir. 1968); *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 206 (2nd Cir. 1967).

Moreover, the Board fails to cite this court's decision in *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921 (6th Cir. 1964), where it was held that because " 'proof of majority status is peculiarly within the special competence of the union' . . . . the burden of coming forward with proof of its alleged majority status [is] upon the union." 330 F.2d at 927. Since it is incumbent upon the party which is cognizant of the facts relevant to a claim of majority status—the Union—to come forward with proof of its claim (either by revealing or expressing a willingness to reveal, such as by an offer of a card check, the basis for its claim), it is not evidence of bad faith that an employer reacted to a "naked" assertion of majority status by suggesting an election rather than by inquiring into the claim.

The Board also points to the unfair labor practices engaged in by the Company as evidence of a lack of good faith. This circuit, however, has decided that the commission of unfair labor practices is not necessarily inconsistent with the existence of a good faith doubt concerning a union's majority status. *N.L.R.B. v. Ben Duthler, Inc.*, 395 F.2d 28, 31 (6th Cir. 1967). The Board concedes that this proposition is correct but attempts to limit its application to cases involving violations of Section 8(a)(1). In *Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812 (6th Cir. 1968), a case involving unlawful discharges, this circuit rejected the imposition of such a restriction and decided that, "The fact that the employer committed unfair labor practices in violation of Section 8(a)(1) *and 8(a)(3)* is not of itself sufficient reason to negative a good faith doubt." 391 F.2d at 820 (emphasis added).

We previously alluded to the fact that the Board's bargaining order was based on its findings of a refusal to bargain in violation of Section 8(a)(5) by the Company. Having decided that the General Counsel failed to sustain

the burden of proving the Company's lack of a good faith doubt with regard to the Union's claim of majority status, we must now assess the propriety of that bargaining order.

This court has enforced a bargaining order based solely on violations of Section 8(a)(1) of the National Labor Relations Act. *N.L.R.B. v. Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965).[9] *Contra, Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812, 820 (6th Cir. 1968). On the other hand, subsequent to the decision in *Delight Bakery* this court said an "order requiring an employer to bargain with a union will not be enforced if there is no substantial evidence on the record as a whole to establish that the employer in bad faith refused to recognize and bargain with the union." *Pizza Products Corp. v. N.L.R.B.*, 369 F.2d 431, 438 (6th Cir. 1966). *Accord, Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 375 F.2d 551, 556 (6th Cir. 1967); *Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812, 820 (6th Cir. 1968). More recently, however, the court once again indicated that a bargaining order would, in some instances, be an appropriate remedy despite the General Counsel's failure to prove an employer's lack of good faith in rejecting a union's demand for recognition. *Pulley v. N.L.R.B.*, 395 F.2d 870 (6th Cir. 1968); *N.L.R.B. v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968). In *Ben Duthler*, after the court concluded that the Board's finding of an unlawful refusal to bargain was not supported by substantial evidence, it went on to point out that the primary responsibility for establishing appropriate remedies "lies with the Board; and where on substantial evidence the Board concludes that a company's illegal interference with its employee's rights to organize and

[9] In *Delight Bakery* an alleged violation of Section 8(a)(5) was dismissed by the Board and not considered by this court.

bargain collectively caused the loss of majority status by a union it has discretion to fashion an effective remedy (including a bargaining order) to restore the status quo ante." 395 F.2d at 33.[16]

We therefore find it appropriate to remand this case to the Board for consideration of the apposite remedy. In fashioning that remedy, the Board should focus on whether it is still feasible to have an election untainted by the unfair labor practices of the Company. Although a bargaining order is often the only effective means of denying an employer the benefit of his illegal actions, it dispenses with an election and may therefore "unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act." *N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74, 78 (2nd Cir. 1965). *See also, N.L.R.B. v. Ben Duthler, Inc., supra.* For this reason the bargaining order should be employed only when alternative remedies would be ineffective.

Of course, the seriousness of an employer's unfair labor practices is also relevant. This relevance, however, extends only to the relationship of the severity of the unfair labor practices to the ultimate inquiry of whether a fair election can still be held. Regardless of how serious an employer's violations are, this should not in itself result in a bargaining order. *See* Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 859-863 (1967). Board orders are remedies, not penalties. *See* St. Antoine, *A Touchstone for Labor Board Remedies*, 14 Wayne L. Rev. 1039, 1040 (1968).

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[16] We observe in passing that in both *Pulley* and *Ben Duthler* the unfair labor practices engaged in by the employer were not deemed serious enough to warrant an order to bargain.

The Board's order is enforced with respect to the Section 8(a)(1) violation to the extent hereinbefore approved, and is enforced with respect to the Section 8(a)(3) violations. However, enforcement is denied with respect to the other Section 8(a)(1) violations and the Section 8(a)(5) violation; and the case is remanded for further consideration of the proper remedial order.

Edwards, Circuit Judge, dissenting.

Respondent's reaction to the union's claim of representation and demand for bargaining rights was to write a letter to the union business agent which said in part:

> "As you may know our business is seasonal and for the past five or more years we have employed only two or at most three men in our warehouse during eight or nine months of the year. During the summer months we must provide replacements for our salesmen during their vacation periods and prior to and during this period we hire temporary help for the summer months.
>
> "It would not be surprising if some or all of the temporary help in anticipation of permanent employment would have contacted your offices for organizing assistance.
>
> "These temporary workers all of whom will be released before September 15, 1965, as the summer season will then be over may favor organization, but I am confident that the balance of our regular employees are not interested in having you or any other organization representing them."

The president of the company also sent copies of this letter to all the employees involved.

The Board found no evidence that respondent's business was seasonal or that any of the employees had been hired as temporary employees. Under the facts of this case the Board was certainly entitled to infer this letter was a threat to discharge union adherents among its warehouse employees and its driver salesmen. *NLRB v. Bin-Dicator Co.*, 356 F.2d 210 (6th Cir. 1966).

Shortly thereafter respondent discharged (or failed to rehire) four employees. This constituted a majority of the union's majority when its representation letter was written. The Board found (and we have found) that these discharges were discriminatory and in violation of the National Labor Relations Act.

On these facts the Board held:

> "The reasons set forth in his September 1 letter to the Union, rather than revealing a reasonable basis for doubting the Union's majority, constituted a patent and unlawful attempt to dissuade the employees from supporting the Union. Respondent's defense to the Section 8(a)(5) charge herein is that it had a good-faith doubt that the Union represented a majority of the employees in the appropriate unit. 'This good-faith doubt must have some reasonable basis and is not established merely by the employer's assertion of doubt of the majority.' *N.L.R.B. v. Superior Sales, Inc.*, 63 LRRM 2197, 2203 (C.A. 8). No reasonable basis for doubt of the Union's majority on the part of the Company has been shown. To the contrary, the conduct of the Respondent herein from the date it first received the Union's demand for recognition demonstrated a desire on its part to frustrate its employees' self-organizational aspirations and to undermine the Union's majority. The Company rejected the Union's

bargaining request, not because it entertained a good-faith doubt as to the Union's majority, but because it rejected the collective-bargaining principle and was seeking time within which to evaporate the Union's strength. In such circumstances, therefore, the Company's refusal to recognize and bargain collectively with the Union constituted violations of Section 8(a) (1) and (5) of the Act."

I believe that on this record the Board had sufficient evidence to reject respondent's good-faith doubt claim and to find that respondent refused to bargain because it "rejected the collective-bargaining principle and was seeking time within which to evaporate the union's strength." In its essentials this case seems to me to be on all fours with *NLRB v. Priced-Less Discount Foods, Inc.*,——F.2d—— (6th Cir. 1968) (Decided December 20, 1968); *Thrift Drug Co. v. NLRB*, ——F.2d—— (6th Cir. 1968) (Decided Dec. 11, 1968); *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965); *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965); *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

Absent the gross violations of the NLRA referred to above, I would join my colleagues in holding that the union should have taken the initiative and offered a card check of its majority. But I hardly see how we can hold that the respondent fired 50% of the employees in the bargaining unit for the unlawful purpose of interfering with employee rights to collective bargaining and still hold that this record does not support the Board's finding that respondent in bad faith refused to recognize and bargain with the union.

What this court has just said in another case seems entirely appropriate to this case:

> "All in all, the course of conduct shown on the part of petitioner immediately after receipt of the union's demand for bargaining rights was that of an employer determined to defeat unionization regardless of the wishes of the employees and completely without regard to the law. The violation of the NLRA found in this case can by no means be characterized as 'borderline' section 8(a)(1) violations as in *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968), or as 8(a)(1) violations 'without more' as in *Lane Drug Co. v. NLRB*, 391 F.2d 812 (6th Cir. 1968). . . . The Trial Examiner and the Board had ample reason to conclude that petitioner's course of conduct represented rejection of collective bargaining rather than a good faith doubt of the union's majority status.
>
> "Under the factual circumstances of this case, we believe that the findings and conclusions of the Board have substantial support in this whole record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).
>
> "Enforcement of the bargaining order may well be the only way to remedy the illegal course of conduct deliberately chosen by petitioner. *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965); *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965); *NLRB v. Delight Bakery Inc.*, 353 F.2d 344 (6th Cir. 1965)." *Thrift Drug Co. v. NLRB*, —— F.2d —— (6th Cir. 1968). (Decided December 11, 1968).

I would grant enforcement of the entire National Labor Relations Board order.

APPENDIX E

United States of America

Before The

NATIONAL LABOR RELATIONS BOARD

G. P. D., Inc.,

and

Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind.

Case No. 7-CA-5321

DECISION AND ORDER

(Filed April 3, 1967)

On November 3, 1966, Trial Examiner Herbert Silberman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board had reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions, the brief, and the entire record in the case,[1] and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner, as modified below.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, G. P. D., Inc., Ferndale, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following to paragraph 1(e) of the Recommended Order and to the last paragraph on page one of the Recommended Notice:

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[1] The Respondent's request for oral argument is denied because in our opinion the record, exceptions, and brief adequately set forth the issues and positions of the parties.

[2] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's findings that: (1) the 8(a)(1) allegations should be dismissed with regard to Respondent's talks with employees Andrus, Blansett, and Rogers pertaining to alleged unlawful statements concerning a better retirement plan, and other alleged benefits; (2) the General Counsel has not proved that the Respondent had engaged in a further violation of 8(a)(5) by undertaking to bargain with employees individually in derogation of the Union's position; and (3) employee Paladino was offered reinstatement to his former position and is not entitled to a further offer of reinstatement.

", except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act".

Dated, Washington, D.C., April 3, 1967.

Frank W. McCulloch, Chairman,
Gerald A. Brown, Member,
Howard Jenkins, Jr., Member,
(Seal) NATIONAL LABOR RELATIONS BOARD.

TRIAL EXAMINER'S DECISION

(Filed November 3, 1966)

Statement of the Case

Upon charges and amended charges filed by Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., herein called the Union, on September 8, 17, and 27, 1965,[1] the initial complaint herein, dated December 10, was issued alleging that the Respondent G. P. D., Inc., herein also called the Company, has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. The complaint, as subsequently amended,[2] in substance: alleges:

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[1] All dates, unless otherwise specifically stated, refer to the year 1965.

[2] By an order of the Regional Director for the Seventh Region of the National Labor Relations Board, dated February 4, 1966, the instant case was consolidated with Case No. 7-CA-5385. Therefore, by an order of the undersigned, dated June 16, 1966, the two cases were severed.

1. Since September 1, the Company unlawfully has refused to bargain collectively with the union (a) by refusing to recognize and negotiate with the Union as the duly designated representative of an appropriate unit of its employees and (b) by undertaking to bargain with employees individually;

2. On September 7 and on September 8, respectively, the Company unlawfully discharged Michael Zamm and Joseph Paladino;

3. Since November 23 the Company has failed and refused to reinstate Leonard W. Andrus and George Morris to their former, or to substantially equivalent, positions upon their unconditional offers to return to work following a strike in which they participated and which was caused and prolonged by the Company's unfair labor practices; and

4. By the foregoing and by other conduct set forth in the complaint the Company has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act.

Respondent's answer to the complaint and its amendments in substance, denies that it has engaged in the alleged unfair labor practices. A hearing was held before the undersigned in Detroit, Michigan, on May 11 and 12, 1966. The hearing and the record in the case was formally closed by an order of the undersigned dated June 16, 1966. The parties were allowed until July 15, 1966, within which to file briefs with the undersigned and briefs were received from the General Counsel and counsel for the Respondent which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of Respondent

Respondent, a Michigan corporation, maintains its principal office and place of business in Ferndale, Michigan, where it is engaged in the sale and distribution of automobile parts and related products. The Company's place of business in Ferndale, Michigan, is the only facility involved in this proceeding. During the calendar year 1965, which period is representative of its operations, the Company, in the course and conduct of its business, sold and distributed from its Ferndale, Michigan, place of business products valued in excess of $150,000 of which products valued in excess of $100,000 were shipped from said place of business directly to points located outside the State of Michigan. I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. *Sequence of events*

1. Background

The Company's operations are essentially distributive. It purchases parts from the Ford Motor Company which it in turn sells to Ford automobile dealerships. In the operation of its business it handles in excess of 600 different items. These products are stored in a warehouse in Ferndale, Michigan. The Company employs driver-sales-

men who load their trucks at the warehouse and cover their respective routes in the States of Michigan and Ohio. These driver-salesmen, in addition to selling and delivering new parts to their customers, accept from such customers used and worn parts. An important facet of the work of both the driver-salesmen and the warehousemen is the identification of the various parts. During the times material hereto the Company operated four truck routes, each serviced by a single driver-salesman. Three of these driver-salesmen reported regularly to the Ferndale warehouse where they unloaded the used parts from their trucks and received new parts. A fourth driver-salesman operated principally out of a facility in Alma, Michigan. On August 31, the Company employed four warehousemen in addition to the four driver-salesmen.[3]

The principal stockholder of the Company, and for practical purposes the sole owner of the Company, during the times material hereto, was Emmet E. Tracy.[4] Although Emmet E. Tracy was president and treasurer of the Company, he spent very little time at its Ferndale premises. According to Tracy's testimony, "I will probably [be] there an hour or an hour and a half every second or third week. Sometimes I am not there for two months but if you average it out it would be an hour or an hour and a half every second or third week." Responsibility for the day-to-day operations of the Company was lodged in John Nixon, Jr., the general manager and sales manager of the

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[3] The driver-salesmen were: Leonard W. Andrus, Raymond Brown, Bob Rogers and Keith Yale (Yale operated principally from Alma, Michigan). The warehousemen were: Harold Bennett, George Morris, Joseph Palestino and Michael Rizzo.

[4] Of 5,000 shares of stock issued and outstanding, Emmet E. Tracy owned 3,000 shares and two charitable organizations owned the remaining 1,000 shares.

Company. The only other management official at the Ferndale premises was Thomas J. Treacy, the son of Vincent R. Treacy, who was the warehouse manager.[5]

2. *The Union's demand for recognition*

The events with which this case is concerned grew out of the efforts of the Company's employees to secure Union representation. In mid-August Joseph Paladino contacted Jerome Coleman, an organizer and business agent of the Union. Following several telephone conversations between Paladino and Coleman arrangements were made for a meeting of employees of the Company. The meeting was held at the Union's headquarters in the evening of August 27 and was attended by eight employees.[6] During the meeting each employee signed an application for membership in the Union, which specifically authorized the Union to act as the collective bargaining representative of the signer.[7] By letter, dated August 30, and received the following day by the Company, the Union notified the Respondent that a majority of its driver-salesmen and warehousemen had designated the Union as their collective bargaining representative and demanded recognition "for

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[5] During the times material herein Alexander Strange was an outside salesman for the Company. One of his duties was to visit the various Ford dealerships and assist the parts departments of such customers in arranging their stocks. Strange, at the times material herein, was about sixty-five years old and there was testimony to the effect that the Company was contemplating his retirement in the near future.

[6] All the warehousemen and driver-salesmen, except Keith Yale, attended the meeting. In addition, Charles Harkins, a former warehouseman who was transferred to an office clerical position, was present.

[7] Printed on the application cards immediately above the signature line is the following statement. "I hereby designate Teamsters Local No. 237, through its authorized agents, as my representative for collective bargaining."

purposes of collective bargaining, as the exclusive representative of such employees." The letter further requested advice as to when a meeting for the purpose of negotiating a collective bargaining agreement might be held.

3. *The Company's rejection of the recognition demand*

The Company's response to the Union's letter, written by Emmett Tracy[4] on September 1 from Harbor Point in northern Michigan where he had been vacationing since July 18, was, as follows:

> I have received and read with interest your letter of August 30 which was forwarded to me at Harbor Point and as I did not want any time to intervene before the contents of your letter becomes known I am replying promptly.
>
> As you may know our business is seasonal and for the past five or more years we have employed only two or at most three men in our warehouse during eight or nine months of the year. During the summer months we must provide replacements for our salesmen during their vacation periods and prior to and during this period we hire temporary help for the summer months.
>
> It would not be surprising if some or all of the temporary help in anticipation of permanent employment would have contacted your offices for organizing assistance.

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[4] Although Emmett Tracy did not normally concern himself with the day-to-day operations of the Company, he testified that after the Union entered the picture he became more involved in the affairs of the Company because "I was better equipped to handle that than [Ninon and Thomas Tracy] were." According to Tracy's further testimony, Ninon and Thomas Tracy had no experience with any labor controversy and he wished to assume personal responsibility for dealing with any problems arising from the Union's organizational effort.

These temporary workers all of whom will be released before September 15, 1966, as the summer season will then be over may favor your organization, but I am confident that the balance of our regular employees are not interested in having you or any other organization representing them.

When you consider the bulk if not all of the Ford Dealer Salesmen and Parts Men on whom our salesmen depend for sales and their livelihood have expressed on many occasions their desire not to be unionized their probable reaction to unionization of our company is almost certain to be detrimental to the sales of our company and the sales and compensation of our commission salesmen.

Because of these conditions over which we have no control it could be a very expensive experiment for our permanent employees and as you know, one from which there could be no retreat once the news was out in the hands of the Dealers and their probable reaction determined.

The value of outside assistance to the employees of an organization having only two or three warehouse employees and three or four outside commission salesmen is at the least very questionable although I would not expect you to agree.

I am attaching a copy of a letter mailed today to all employees for your information.

If you really believe you represent a majority of our permanent employees I would suggest that you arrange to have the National Labor Relations Board schedule an election to determine the accuracy of your claim.

As stated therein, a copy of the letter was mailed to each employee. No evidence was adduced on behalf of the Company tending to demonstrate any reasonable basis for Tracy's expressed confidence that the Company's "regular employees are not interested in having you or any other organization representing them."

The General Counsel contends, which contention will be discussed below, that Tracy's letter in and of itself constitutes a violation if Section 8(a)(1) of the Act on the part of the Company. The Union, following receipt of the Company's letter rejecting its demand for recognition, on September 2, filed a petition with the Board requesting certification as representative of the Company's warehousemen and driver-salesmen. However, because of the charges filed in this case, no further proceedings have been had in the representation matter.

4. *Tracy's activities on September 7; the discharges of Zamm and Paladino*

On Tuesday, September 7, Emmet Tracy appeared at the Ferndale warehouse. During the course of the day, he separately interviewed at least five employees. Two of the employees were Michael Zamm and Joseph Paladino, who are alleged in the complaint to have been discriminatorily discharged. In addition, Tracy spoke with Raymond Horne, Leonard Andrus and Harold Blansett. General Counsel contends that certain remarks made by Tracy during these interviews constituted further unlawful infringements of employees' rights.

According to the uncontradicted testimony of Leonard W. Andrus, Tracy inquired whether Andrus had received his letter replying to the Union's request for recognition and then stated that "like the letter itself said, I wouldn't

be bothered by him or threatened, any action or anything against me." Tracy inquired whether Andrus thought the Union could help, and remarked that he could understand why Keith Yale could go for the Union but not Andrus, because Yale worked at a lower pay scale. Tracy also said that the Company had been "working on bettering the conditions, easing the work load," and that if the employees had raised the question about a raise "before this [the Union] had come about" it could have been discussed, but "now nothing could be changed." Tracy also told Andrus that "he had beaten [Unions] a number of times before and it wasn't new to him."*

Raymond Horne testified without contradiction that Tracy told him that something might have been done with respect to a pay raise had the employees gone to Tracy before they went to the Union. Tracy mentioned that if the Union gets in, Horne will not be speaking for himself but the Union will speak for him, and said something to the effect that a lower class of people, such as factory workers, were involved in unions. Tracy advised Horne that anyone carrying a union card probably would not be able to get a position as a Ford Motor Company representative. Tracy also informed Horne that "he had beat the union before."

During his separate interviews with Michael Zamm and Joseph Paladino, Tracy notified them that they were being discharged. Zamm was terminated on September 7 and Paladino was terminated the next day.

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*Tracy made a similar remark to Joseph Paladino. According to Paladino's uncontradicted testimony, on September 7, Tracy said that "he wasn't afraid of the union, that he had defeated the union for the last twenty-five years . . ."

5. The strike

Following the discharge of Paladino on September 8, the Company's driver-salesmen and warehousemen, except Rogers who was out of town,[11] met at a tavern near to the plant where the discharges of Zamm and Paladino were discussed. After Union business agent Coleman was contacted, the employees with the concurrence of Coleman decided to engage in a strike, which was begun the next morning. All the driver-salesmen and warehousemen, including Rogers, but excluding Keith Yale, participated in the strike. From the commencement of the strike on September 9 until October 25 no attempt was made by the Respondent to conduct normal operations from its Ferndale warehouse. The General Counsel contends, and the Respondent in its brief concedes, that the driver-salesmen and warehousemen engaged in the strike in protest of the discharges of Paladino and Zamm. Accordingly, if these discharges were unlawful, and for the reasons discussed below I find they were unlawful, the strike was an unfair labor practice strike.

The means used to advertise the strike was by a sign draped across an automobile parked near the plant entrance plus desultory patrolling of the premises by the striking employees wearing "on strike" notices.[12]

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[11] Keith Yale, who did not normally operate out of the Ferndale warehouse, probably was not present at the meeting.

[12] Respondent's contention that it did not know whether the strike had the support of a majority of the driver-salesmen and warehousemen is inconsistent with the facts. Elmont E. Tracy testified to conversations he had with employees Rowe, Rogers and Blundell concerning abandonment of the strike by them. The testimony about these conversations indicate that Tracy was aware that all the driver-salesmen and warehousemen who regularly operated from the Ferndale warehouse had been supporting the strike. Furthermore, no explanation is offered by the Company as to why it stopped its normal operations from the Ferndale warehouse if it did not believe that a majority of the driver-salesmen and warehousemen supported the strike.

On September 21, the Union sent a telegram to Respondent's attorney reaffirming its demand for recognition as the representative of a bargaining unit of the Company's driver-salesmen and warehousemen and suggesting commencement of negotiations. The Company's attorney responded the same day by telegram as follows:

> Question of representation of G P D employees is now pending before the National Labor Relations Board. We do not believe employees have been given free opportunity to determine whether they want you as collective bargaining representative. Company will abide by result of election if ordered by Board. Your request for meeting is therefore refused.

6. *Termination of the strike*

On October 15, while the strike was still in progress, Emmet Tracy called several driver-salesmen into the plant separately to give them checks for commissions earned by them prior to the commencement of the strike. The conversation with Raymond Horne ultimately led to the termination of the strike. General Counsel contends that some of the remarks made by Tracy to employees on October 15 and in subsequent conversations with employees prior to the termination of the strike constituted further violations of the Act on the part of the Respondent.

According to the uncontradicted testimony of Leonard Andrus, after Tracy gave him the commissions check, Tracy showed Andrus a brochure concerning a retirement plan and said that this plan was in effect at two other establishments in which Tracy had an interest and Tracy saw no reason why the employees at the Company did not also have such plan. Tracy pointed out to Andrus that because George Morris, another striking employee, was 49

years old, he would never be in a position to draw any retirement pension from the Union. Tracy also made some comment concerning the outcome of a possible representation election. According to Andres, Tracy said that the votes of Palumbo, Rosen and Barbee (the employees most recently hired by the Company) would cancel the votes of Andres, Horne and Rogers (the regular driver salesmen)."

During Tracy's conversation with Horne, on October 15, Horne inquired whether the employees could return to work. Tracy responded that that could be done but the employees would have to return on the same basis as existed when they went on strike. Horne said that he would like to talk to the people. Several days later Horne telephoned Tracy and inquired if he and Rogers could speak with him. Tracy invited them to his office. A meeting took place on Friday, October 22. Horne informed Tracy that he and Rogers were speaking for themselves only and that they wished to return to work. Tracy responded that that would be satisfactory. Tracy inquired as to why they had been on strike. This led to a discussion of the employees' grievances. According to Horne, Tracy responded that he thought their grievances could be worked out but "there was nothing he could do for us at the present time, on account of this being tied up." Tracy's version of their conversation concerning the employees' grievances while somewhat fuller and somewhat at variance with Horne's version is not substantially different.

"Ernest Tracy did not contradict the testimony of Andres concerning their conversation. Tracy explained that he wondered whether or not the absence of a retirement plan was one of the reasons for the strike and he raised the question with Andres because he understood that at some earlier date the employees were polled as to whether or not they wished the retirement plan and they had indicated that they were not interested in any such plan.

In essence, Tracy's responses were to the effect that the remedy for some of the grievances was beyond his control because he was required to comply with policies of the Ford Motor Company; and that some other matters, such as holidays and vacations about which the employees were complaining to him, were primarily within their individual control because as driver-salesmen they were paid exclusively on a commission basis and the fewer hours they worked the less money they made. He said he was under the impression that the Company was doing the driver-salesmen a favor by permitting them to make up for time lost. Both Horne and Rogers returned to work on Monday, October 25. No change in their compensation arrangements was made upon their return to work.

On Wednesday, October 27, Emmet Tracy visited Harold Bimmett at the latter's home and urged Bimmett to return to work for the Company. According to Bimmett, during their conversation, Tracy said that a thousand dollars bonus would come in handy at Christmas and reminded Bimmett that it was only three weeks until Christmas. Tracy's version of the conversation is not substantially different than Bimmett's. According to Tracy, he pointed out to Bimmett that the latter had made more money with the Company than he was making with the employer for whom he was then working and he made a somewhat indirect reference to the Company's practice of paying an annual bonus.[1] Also, during the conversation, Tracy showed

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[1] In 1956 Bimmett received a bonus. While the record is not altogether clear as to this matter, it appears that the bonus was paid during the summer of that year and was in the amount of approximately $1,000. Bimmett testified that as early as 1955 he had been advised that bonuses would be paid in December and July but that employees must be actually employed by the Company at the time the bonus was distributed in order to receive the same.

Blansett a document which he said was a retirement plan in effect at two other establishments in which Tracy had an interest. Tracy said that the retirement plan was better than the Union's plan and that the employer paid the premiums. Tracy also said that we had a retirement plan at the Company and it probably was discontinued because the employees did not wish it. Blansett did not testify that any promise was made to him by Tracy regarding the institution of a retirement plan for the Company's employees.[14]

Of the seven driver-salesmen and warehousemen who went on strike[15] three, namely, Horne, Rogers and Blansett returned to work during the week beginning Monday, October 25. On November 23, Union Business Agent Coleman sent a telegram to the Company requesting the reinstatement of the remaining four employees, namely, Leonard Andrus, George Morris and the two employees who had been discharged earlier, Michael Zamm and Joseph Paladino. According to General Counsel, the Respondent refused to reinstate these four employees and the refusals to reinstate Andrus and Morris constituted unlawful discrimination against them.

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[14] Blansett testified that Tracy said, "Is this what you boys are looking for?" and Blansett replied, "That's what I am looking for." However, Tracy said nothing further about the matter. This testimony does not spell out a promise on the part of Tracy to inaugurate a retirement plan for the Company's personnel.

[15] The record makes no reference to the participation of Keith Yale in the strike.

B. Conclusions

1. *As to the alleged independent violations of Section 8(a)(1)*

The Company's first overt response to its employees' self-organizational effort was the letter, dated September 1, from president Emmet E. Tracy to the Union, quoted above, copies of which were also mailed to the driver-salesment and warehousemen. Two aspects of this letter I find to be unlawful:

One: in this letter, president Tracy speculates that the more recently hired employees (whom he refers to as "temporary help") were the initiators of the union activity.[10] He then advises that they will be discharged before September 15. This advice constitutes an unequivocal threat of discharge. The juxtaposition of such threat with the surmise that the selfsame employees were responsible for the Union's appearance would lead the employees who received the letter to understand that the so-called "temporary help" were going to be discharged for having engaged in self-organizational activities. Emphasizing the underlying meaning of these statements is the expression of confidence that "our regular employees are not interested in having you or any other organization representing them" which, in context, stands as a warning to the so-called

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[10] In this respect the letter states:

> It would not be surprising if some or all of the temporary help in anticipation of permanent employment would have contacted your offices for organizing assistance. These temporary workers all of whom will be released before September 15, 1965, as the summer season will then be over may favor your organization, but I am confident that the balance of our regular employees are not interested in having you or any other organization representing them.

regular employees that they might be subject to similar reprisals should they also seek Union representation. The Company cannot fairly assert that the letter merely served to tell the Union (and the employees who were also sent copies of the letter) why it was rejecting the demand for recognition because the facts set forth in the letter purporting to justify the Company's alleged doubt as to the Union's claim of majority are without any evidentiary support in the record. First, the letter states that "our business is seasonal." There is no evidence of this fact. Second, likewise unsupported by record evidence is the assertion that "prior to and during this period (summer months) we hire temporary help for the summer months." While Emmet Tracy, who is not concerned with the day-to-day operations of the Company and who spends very little time at its business premises, testified in general fashion that it was the Company's practice to hire temporary help to work in the warehouse during the summer months, no payroll records or other competent evidence within the control of the Company was offered to corroborate this assertion,[11] which leads me to conclude that such statement in president Tracy's letter was a gross exaggeration. Impinging further upon the accuracy and reliability of the statement that it was the Company's practice to hire temporary help for the summer months is the fact that none of the driver-salesmen or warehousemen then working for the Company had been informed prior to their receipt of Tracy's letter that they had been hired to work only for a temporary period. Third, no reasonable basis has been advanced as to why Tracy was confident that "our regular employees are not interested in union representation."

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[11] For reasons discussed more fully below, see footnote 23, I do not consider the testimony of Harold Blansett as corroborating Tracy's testimony.

Two: the prediction contained in said letter that the unionization of the Company's employees would be detrimental to the sales of the Company and "the sales and compensation of our commission salesmen (the driver-salesmen)" constituted a plain warning to the employees that union representation would result in a reduction of income. Such threat, so far as the record shows, was fabricated from whole cloth. As stated in *International Union of Electrical Workers v. N.L.R.B.*, 289 F. 2d 757, 763 (C.A.D.C.), "No evidence was adduced at the hearing to support that assertion or show any basis for the . . . belief in its truth . . . . It seems clear that Congress did not intend to protect any unqualified assertion of such importance unless the utterer can show that he had some reasonable basis for it." Accordingly, I find that the threats expressed in Tracy's September 1 letter to the effect that employees who lend support to the Union would be discharged and that driver-salesmen who join the Union will suffer a reduction in their earnings constituted unlawful restraint and coercion of employees in violation of Section 8(a)(1).

Emmet Tracy's next moves were made on September 7 when he interviewed five employees separately. With respect to his conversations with Leonard Andrus and Raymond Horne, I find that Tracy's remark to Andrus that the Company had been "working on bettering the conditions, easing the workload" and his remarks to both employees to the effect that something might have been done with respect to a pay raise had the employees come to him before they had gone to the Union but that now nothing could be changed, were not unlawful. Contrary to the General Counsel, these statements did not serve to inform the employees that because of the advent of the Union they were being denied increases in pay or other benefits.

Neither did these statements serve to advise the employees that the abandonment of the Union on their part would lead to improvements in working conditions or other benefits. While Tracy's purpose in speaking with these two employees undoubtedly was to discourage their adherence to the Union, this factor is not sufficient to tinge the statements referred to with an unlawful coloration of threat or promise of benefit. However, Tracy's statement to Horne that anyone carrying a union card probably would not be able to obtain a job as a Ford Motor Company representative carried with it the implication that employees who joined the Union would be blacklisted and would be unable to obtain employment with Ford Motor Company.[10] *Leed's Shoe Store, etc.*, 149 NLRB 500, 508, 510. Such statement, therefore, constituted a violation of Section 8(a)(1) on the part of the Company.

General Counsel contends that in October, during the strike, Emmet Tracy made unlawful promises to employees Andrus, Horne, Rogers and Blansett. With respect to Tracy's separate conversations with Andrus and Blansett concerning a retirement plan, I find that the testimony does not establish that Tracy either directly or by implication promised that a retirement plan would be inaugurated should they abandon the strike or the Union. The mere fact that Tracy discussed with Andrus and Blansett the retirement plan, which was in effect at other establishments in which he had a proprietary interest, and mentioned that he understood that a similar plan had been offered to the Company's employees and turned down by them at some much earlier date does not amount to an im-

[10] Neither Emmet Tracy nor anyone else on behalf of the Company testified that there was any factual basis for the statement that a Union member would be unable to obtain a position as a representative for the Ford Motor Company.

plied promise that such plan would be instituted by the Company should the employees abandon the strike. Likewise, I find that Emmet Tracy did not promise Blansett a $1,000 Christmas bonus if he would abandon the strike and go back to work. Upon consideration of the testimony of both Blansett and Tracy concerning the subject, I find that Tracy merely reminded Blansett during their conversation on October 27, of the Company's practice regarding the payment of bonuses. Pointing out to Blansett what he would lose under the Company's established compensation practices if he did not return to work for the Company does not amount to an unlawful promise of benefits.

General Counsel also contends that Emmet Tracy during his conversation with Horne and Rogers, before their return to work on October 25, promised them improvements in vacation benefits and holiday practices. Here, too, I find that these discussions were devoted merely to an explanation of the Company's existing practices in regard to vacation and holiday benefits and the considerations governing such practices, and did not involve any promise of improvements in such benefits to induce Horne and Rogers to abandon the strike or discontinue support of the Union. The evidence is undisputed that, in fact, since the termination of the strike there have been no changes in the employees' wages or conditions of work.

2. *As to the discharges of Zamm and Paladino*

Of the eight employees in the unit of driver-salesmen and warehousemen for which the Union requested recognition as statutory representative, the last hired by the Company were Joseph Paladino, who was hired on February 27, and Michael J. Zamm, who was hired on March

16. Presumably, Emmet Tracy was referring to these two employees by the assertion in his September 1 letter to the Union that "we hire temporary help for the summer months."[19] The letter also reflects Tracy's unmistakable opposition to the Union and contains a clear expression of his belief that the "temporary help" probably were responsible for the organizational activity among the Company's employees. Furthermore, the letter, copies of which were mailed to all the driver-salesmen and warehousemen, constituted the first advice to Paladino and Zamm that they were temporary employees and would be "released before September 15, 1965." Pursuant to this threat, Paladino and Zamm were discharged by Emmet Tracy. General Counsel's position is that the two men were discriminatorily discharged by Tracy because of Tracy's belief that they were the instigators of the Union activity to which he objected. Respondent's defense is that Paladino and Zamm were temporary employees who were discharged when their services were no longer required.

Joseph Paladino applied for work with the Company in response to an advertisement for a driver-salesman which appeared in The Detroit News between January 21 and 27.[20] He was first interviewed by sales manager Nixon and subsequently, on February 26, in a telephone conversation with warehouse manager Thomas L. Tracy, was advised to report for work the next day. When Paladino arrived at the warehouse he was informed by Thomas Tracy that he would do general warehouse work and would receive training for a driver-salesman's position. (An im-

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[19] Emmet Tracy testified at the hearing that Zamm and Paladino were the only employees whom he considered to have been "temporary."

[20] The advertisement also stated, "Monthly salary $700-$800."

portant facet of the work of the driver-salesman and also of the warehousemen was the ability to identify the more than 600 different automobile parts handled by the Company. Much of the references in this case to the training of driver-salesmen is to such parts' identification, which training was contemplated would for the most part take place in the warehouse.) Paladino's arrangement, during the time he was employed by the Company, was that he would be permitted to operate a bakery route so that his hours of work were from about noon until sometime in the late afternoon, which was less than a normal work week."

At no time during his employment interviews or prior to September was Paladino advised that his job was temporary. His starting rate of pay was $2 per hour. About 4 weeks later he received an increase of ten cents per hour at which time Nixon advised him that both Nixon and Thomas Tracy were more than satisfied with his work and progress. About 6 or 8 weeks thereafter Paladino received an additional increase of five cents per hour. In July, Paladino spent two weeks assisting driver-salesman Leonard Andrus on his route in order to learn more about the driver-salesmen's duties. After his return from the trip, Thomas Tracy complimented Paladino on the work he had been doing. Periodically, Paladino was complimented by Thomas Tracy and by Nixon and was never criticized by either of them.

Michael J. Zamm applied for a job with the Company in response to an advertisement for a warehouseman with "opportunity for man under 40 to advance to high paying

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" The understanding between Paladino and the Company was generally to the effect that he would not be called upon to give up his bakery route until he was assured that he would be advanced to the position of driver-salesman, at which job his earnings would be substantially greater than as a warehouseman.

future," which appeared in The Detroit News between March 14 and 16. He was interviewed and hired by Thomas Tracy, who informed Zamm that the Company wanted a man with sufficient intelligence to learn the parts and the business. Zamm was also interviewed by Alexander Strange about his sales background and ability to operate a truck. At no time prior to September was Zamm informed that he was hired on a temporary basis. To the contrary, on March 16 or 17, Zamm and another employee were specifically advised by Thomas Tracy that there would be no layoffs, that the employees worked 40 hours per week, every week of the year.

About 6 weeks after the beginning of his employment Zamm received an increase of 15 cents per hour at which time Thomas Tracy told Zamm that he was doing a good job. In early June, Zamm was assigned to help driver-salesman Rogers on the latter's route for a period of 3 to 4 weeks in order to become further acquainted with the Company's operations. Zamm also was relief driver for 1 day on which occasion he was accompanied by sales-manager Nixon. During the summer Zamm substituted for George Morris, who had charge of shipping and receiving, while Morris was away on vacation.

According to Zamm's uncontradicted testimony, approximately 3 weeks before he was discharged, Thomas Tracy advised him that Tracy was pleased with his work and that while Morris was on vacation the warehouse was "in very good shape and seemed to be run very well and asked me to take a more active part in the actual running of the warehouse." Thomas Tracy also told Zamm on this occasion that Nixon was pleased with his work on the day Nixon accompanied him on the truck and "they would like to keep me around in case an opening came up."

Although Emmet Tracy had delegated to others the responsibility for the day-to-day operations of the Company and spent very little time at the warehouse and although Emmet Tracy testified that it is unusual for him to talk with rank and file employees, nevertheless, he personally discharged both Zamm and Paladino. Towards the end of the work day on September 7, after he had called several other employees to the office, Emmet Tracy summoned Zamm. Tracy told Zamm that in the past Blansett and Morris had run the warehouse themselves, now that the summer was over, which he said was the rush period, he believed he had too much help and because Zamm had the least seniority Zamm was being terminated. Emmet Tracy further explained that he believed Blansett, Morris and Paladino could handle the work. Emmet Tracy asked Zamm to sign a termination receipt acknowledging that Zamm's employment had been on a "temporary or vacation relief basis." Zamm at first objected to signing such instrument which he believed was contrary to the fact. Emmet Tracy called his son into the office and asked if he had hired Zamm on a temporary or vacation relief basis and Thomas Tracy replied, "not exactly," However, after some further discussion and after the words "or vacation relief" were stricken, Zamm signed the document. Zamm testified that he signed the paper because he was afraid that he would not otherwise get his check for wages earned to the date of his discharge. Before Zamm left he inquired whether his discharge was a reflection upon his work to which Emmet Tracy replied that his work had been satisfactory but that Tracy had been told that Zamm would never make the grade as a driver-salesman.

About 4 p.m. on the same day, Emmet Tracy called Paladino into the office. He complimented Paladino with

respect to his work, but said that he was sorry he had to terminate Paladino because Paladino was a temporary employee whose services were no longer needed. Paladino disputed the assertion that he was a temporary employee. Tracy asked Paladino to sign a termination receipt identical to the one Zamm was asked to sign, however, Paladino refused. After some additional discussion Tracy said he wished to speak with Nixon and would meet with Paladino the next day. On September 8, Paladino again was called to the office by Emmet Tracy and this time John Nixon was also present. There was more discussion about Paladino's alleged status as a temporary employee, following which he was discharged. Paladino did not sign the termination receipt.

Respondent argues in its brief that because of seasonal requirements employees were often hired in the spring and discharged in the fall when the work load no longer demanded their services and, pursuant to this practice, after business had decreased to a point where there was surplus of manpower, Zamm and Paladino, who had the least seniority, were discharged. "In short," according to the brief, "neither Mr. Zamm nor Mr. Paladino exhibited the potential required for a driver-salesman trainee program. Moreover, Mr. Zamm, it was felt, could never make the necessary improvements and Mr. Paladino indicated no willingness to do so. It was quite understandable, then, that these two men would be terminated at the end of the summer when the vacation period for regular employees was over. These men were simply excess employees at that point."

Little convincing evidence was adduced to support the factual assertions—in Respondent's argument. First, the suggestion that the business is seasonal is completely with-

out evidentiary foundation.[22] Second, the only evidence offered to support the assertion that there was a practice of hiring temporary employees to work between the spring and the fall is the testimony of Emmet Tracy to such effect. However, he was unable to furnish any particulars from memory and the Company did not introduce any substantial corroborative evidence,[23] which should have been available in the form of Company records if such assertion were true. Third, there is no evidence that there had been any decrease in the Company's business. Fourth, no explanation was offered as to the basis for the company's determination that as of September 7, there was an excess number of persons working in the warehouse.

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[22] Emmet Tracy in his September 1 letter to the Union stated without qualification that "our business is seasonal." However, in its brief, the Company equivocated by referring merely to "seasonal requirements."

[23] Respondent in its brief points to the testimony of Harold Bissett as being corroborative. In response to a question by the General Counsel Bissett testified, "They (warehousemen other than himself and George Morris) always come in in the summer or in between times." On cross-examination, Bissett further testified:

> Q. You said each year in the summer time the Company had some extra employees in, and they worked, in the warehouse, is that right?
>
> A. Yes, they did; because every time I would come in I would see a new face.
>
> • • • • •
>
> Q. . . . Would you estimate how many persons you have seen come and go after a temporary period of employment at GPD in the last five years?
>
> A. To be truthful, I couldn't give you an exact figure. I would say around—by guessing—I'd say twenty or twenty-five men.
>
> Q. Over what period of time?
>
> A. In the past 5 years, counting the ones that just stayed a week.

This vague and indefinite testimony by a rank and file employee, largely in response to leading questions, falls far short of establishing the existence of an employment practice on the part of the Company of hiring temporary employees to work during the summer months only.

Neither Emmet Tracy nor managers Nixon or Thomas Tracy testified specifically as to the minimum number of warehouse employees that was required for the normal operations of the Company. However, the testimony of Thomas Tracy and Harold Blansett indicate that at no relevant time were there fewer than two full-time men employed in the warehouse. Thomas Tracy testified that during the greater part of 1964 there were three full-time employees working in the warehouse and not until a Mr. Thompson, who worked for the Company for a period of 6 months, was terminated in December 1964 did the number of employees fall to two. The two persons who were regularly employed as warehousemen prior to 1965 were Harold Blansett and George Morris. In addition, various other men worked in the warehouse from time to time. However, before the start of the 1965 vacation period, Blansett was assigned to work with Alexander Strange, who was the outside salesman. While assigned to assist Strange, Blansett spent nine-tenths of his time away from the warehouse and worked in the warehouse only when an additional warehouseman was needed as a substitute for an ill employee or for a similar reason. Blansett further testified that he does not remember working in the warehouse at anytime between February and September. Blansett explained that, in January or February, Emmet Tracy had told him that Alexander Strange was approaching the retirement stage and Emmet Tracy wanted Blansett to learn the job. Thus, immediately prior to September 7, the only full-time employees working in the warehouse were Morris and Zamm. In addition, Paladino worked during the afternoons, and Blansett was available to fill in cases of emergency. As the Company did not operate with fewer than two regular warehousemen, and usually had more, it does not appear that there then existed

the alleged surplus of manpower in the warehouse. However, on September 7, Blansett to his surprise was informed by Emmet Tracy that as of that day he was to return to work in the warehouse. No explanation was given to Blansett for this shift in his duties. Likewise, no explanation was made at the hearing as to the reason for Blansett's transfer back into the warehouse. In the circumstances, an inference may be drawn that Blansett was returned to warehouse duties in order to create the appearance that there existed a greater number of regular warehouse employees than was required in order to furnish an ostensible reason for terminating Zamm and Paladino."

Respondent's defense that Zamm and Paladino were discharged on September 7 and 8, respectively, solely because there was no longer any need for their services is unpersuasive. First, Emmet Tracy in his letter of September 1, to the Union and his conversations on September 7, with Zamm and Paladino sought to characterize their employment as temporary for the summer months. However, at the hearing, he redefined the term "temporary" by testifying, "I classify [anybody that we hire in our place] as temporary until the day that they are established

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" There is evidence that for a short period during the summer of 1985 there may have been more employees working in the warehouse than were needed. Thomas Tracy testified that in August the following men were working in the warehouse: Morris, Zamm, Markes and Paladino and Blansett "on and off and on basis." However, Markes was transferred out of the warehouse to do office clerical work so that the number of regularly assigned warehousemen was reduced to two full-time employees plus Paladino who worked in the afternoons. Absent evidence to the contrary, it may be assumed that the transfer of Markes out of the warehouse, reduced, if it did not eliminate entirely, any excess employee time in the warehouse. Also, it is to be noted that Paladino worked part time from noon or 1 p.m. until the day's work was finished, which varied from 4 p.m. to 7 p.m., so that there was some flexibility in the manpower available to accommodate fluctuations in the workload.

as a permanent employee who can do the work for which we hired them." Thus, there is a shifting in Respondent's reason for terminating Zamm and Paladino from the one given to the Union and to the dischargees that the two men were hired as temporary summer replacements to the more refined position advanced at the hearing that after their lack of qualification for advancement to driver-salesmen positions became apparent, they were retained to work in the warehouse only until the summer vacation period was over when their services would no longer be required. Second, although Emmet Tracy was away from the Company's Ferndale plant continuously from July 18, nevertheless, on September 1, he informed the Union that the "temporary help," namely, Zamm and Paladino, will be released before September 15. According to the not altogether consistent testimony of Emmet Tracy, Thomas Tracy and John Nixon, by reason of separate telephone conversations between Emmet Tracy on the one end and Thomas Tracy and Nixon on the other, Emmet Tracy learned that the Company would not require the services of Zamm and Paladino after the summer vacation period. However, about the same time that these alleged discussions were taking place, Thomas Tracy told Zamm that the Company "would like to keep [him]." Thus, there is a direct and unexplained contradiction between the information purportedly given to Emmet Tracy concerning the personnel requirements in the warehouse and the statement made by Thomas Tracy to Zamm. Third, no explanation is offered as to why on the very day Zamm was discharged allegedly because his services were no longer required in the warehouse, Emmet Tracy transferred Blansett to work in the warehouse. Fourth, Emmet Tracy testified that he was told by Nixon that either for want of capacity or of interest neither Zamm nor Paladino had the potential to become driver-salesman. However, neither

Zamm nor Paladino was informed of their alleged deficiencies, but to the contrary, on several occasions, each was praised for doing a good job and was led to believe that when driver-salesmen vacancies should occur they probably would be advanced to such positions. Fifth, although Emmet Tracy was not concerned with the day-to-day operations of the Company and normally did not either hire or discharge employees, nevertheless, he undertook personally to discharge Zamm and Paladino on the first day he returned to the plant after an absence of more than 7 weeks. Completely unexplained was the necessity for Emmet Tracy to involve himself in what presumably—if the Company's defense is to be believed—was a routine termination. Furthermore unexplained is the reason for seeking termination receipts from the dischargees acknowledging, contrary to the facts, that they were hired on a "temporary or vacation relief basis."[23]

Upon consideration of all the evidence bearing upon the discharges of Zamm and Paladino, including the fact that the reasons ascribed for their discharges are unconvincing and the further fact that Emmet Tracy, who openly advertised his opposition to the employees' self-organizational activities and his belief that the "temporary help" (Zamm and Paladino) were responsible for such activities, contrary to normal practices, personally undertook to discharge these two individuals, I conclude that they were discharged not for the reasons advanced by the Company but because of their actual or suspected Union activities.

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[23] I am of the opinion that Emmet Tracy, who was the principal witness for the Respondent, deliberately distorted many of the facts about which he was questioned in order to lend conviction to Respondent's defense. I find that Emmet Tracy was an unreliable witness and I have credited his testimony only to the extent indicated in the findings of fact herein set forth.

Such discharges, therefore, violate Section 8(a)(3) of the Act and also constitute interference, restraint and coercion of employees in the exercise of the rights guaranteed in Section 7 in violation of Section 8(a)(1) of the Act.

2. *As to the refusals of reinstatement*

The strike which began on September 9 was precipitated by, among other factors, the unlawful discharges of Zamm and Paladino. The strike therefore was an unfair labor practice strike and the striking employees were entitled, upon application, to reinstatement to their former, or to substantially equivalent, positions. On November 23, Jerry Coleman, the Union's business representative, sent the following telegram to the Company:

> Gentlemen, the employees named below hereby unconditionally apply to reinstatement in their former or substantially equivalent position with your company Leonard Andrus, George Morris, Michael Zamm and Joseph Paladino when these employees have been returned to their job the current strike and picketing activities will cease. The above named employees will report for work at their usual time on Monday, November 29, 1965 unless we hear from you to the contrary in the interim.

None of the employees mentioned in the telegram reported for work on November 29. However, each of them shortly after said date made a personal application for reinstatement.

Leonard W. Andrus: There is some confusion concerning the dates when Andrus made the telephone calls and visits discussed below. However, there is no substantial dispute as to what occurred. On or before December 1, Andrus

telephoned the Company and spoke with plant manager Nixon. He told Nixon that he was ready to "come back to work." Nixon replied that he had no authority in the matter and that Nixon would have to contact Emmet Tracy. Nixon suggested that Andrus telephone again. Subsequently, Andrus again telephoned Nixon who told Andrus to come to the plant on a particular day and speak with Mr. Tracy. However, Andrus did not report to the plant on the day mentioned. Thereafter, Andrus had a telephone conversation with Emmet Tracy and told Tracy he was ready to come back to work. Tracy replied that there had been too much misunderstanding, that everything would have to be in writing and that Andrus would have to come to the plant. Accordingly, Andrus met with Tracy on December 3. In their conversation on that date, Emmet Tracy told Andrus that his job had been filled and that Andrus could be assistant to the warehousemen. Andrus replied that he would have to think about the matter. Before Andrus left the meeting Tracy gave him a letter which advised him that unless he reported for work on December 6 he will be considered as having no further interest in employment with the Company. On December 8 the Company mailed to Andrus a letter terminating his employment. The position offered to Andrus of assistant to the warehouseman was not substantially equivalent to the position of driver-salesman which Andrus held at the time he went out on strike. As an unfair labor practice striker, Andrus, upon application, was entitled to reinstatement to his former position even if the Company was required to discharge his replacement. No evidence was offered on behalf of the Company that Andrus' former job had been filled as of December 3, the date on which he had his conversation with Emmet Tracy. In its brief, Respondent makes no contention that Andrus was denied reinstate-

ment because he had been replaced in his job. The argument advanced by Respondent in its brief is that Andrus had no interest in returning to the Company as an employee. However, the question of genuineness of Andrus' application for reinstatement was not put to a fair test because Andrus was offered a substantially inferior position by the Company.[36] Accordingly, I find that the Company unlawfully refused to reinstate Andrus to his former position when he made application for such reinstatement on December 3. Accordingly, I find that Respondent thereby has violated Section 8(a)(1) and (3) of the Act."[37]

George Morris: Morris also did not report for work on November 29. However, before the end of the month he telephoned warehouse manager Thomas Tracy and asked Tracy whether he could come back to work. Tracy replied that he would have to speak to his father. Morris then said that he was employed but does not work on Saturdays and asked Tracy to call him then. Tracy replied he would let Morris know. Neither Thomas Tracy nor anyone else on behalf of the Company attempted to contact Morris. As Morris made a clear and unconditional request to return to work in his telephone conversation with Thomas Tracy and as the Company never thereafter reinstated him, I find that Morris was unlawfully denied reinstate-

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[36] The evidence shows that driver-salesmen earned in excess of $10,000 per year while the wages of the warehousemen were substantially lower.

[37] Because Andrus failed to report for work on November 29, the date stated in the Union's telegram, the Company was justified in insisting that Andrus apply for his job in person in order to avoid any misunderstanding. Accordingly, I find that the date of discrimination against Andrus began on December 3 when he met with Emmet Tracy rather than on the date when he spoke to Nixon and first requested reinstatement.

ment in violation of Section 8(a)(1) and (3) of the Act."[9] As Morris was uncertain as to which day in November he spoke with Tracy, I shall find that Respondent's unlawful refusal to reinstate Morris began as of December 1.

Michael Zamm: I have hereinabove found that Michael was discriminatorily discharged on September 7. The discrimination against Zamm continues until Respondent offers Zamm reinstatement. Although Zamm did not report for work on November 29, as the Company was advised he would do by the Union's telegram, nevertheless, that does not suffice to discharge Respondent's obligations to Zamm as an employee who was terminated in violation of the Act. There is no evidence that the Respondent at any time after September 7 offered Zamm reinstatement. Accordingly, I shall recommend that the Respondent offer Zamm reinstatement to his former or to a substantially equivalent position.

Joseph Paladino: Paladino had a discussion with Emmet and Thomas Tracy concerning his reinstatement. Although he did not remember when the discussion took place, in the light of all the surrounding circumstances, it probably occurred about December 1. According to Paladino, "they didn't offer [him] a driver-salesman training job;" but they offered to reinstate him to do cleanup or any bit of work that might be needed around the warehouse. Upon further examination, Paladino testified that there was no specific discussion about further training for the position of driver-salesman, but he assumed that advancement to such position was foreclosed to him because of the attitude

[9] Contrary to Respondent, Morris was under no obligation to pursue the Company with repeated requests for reinstatement even if he might conveniently have done so.

of Emmet Tracy, as displayed during their conversation. According to Paladino, except that he believed the offer of reinstatement did not include further training for the position of driver-salesman, he was offered reinstatement to the same job he held when he was discharged on September 8. While the manner adopted by the Tracys in their discussion with Paladino may have led Paladino to believe that they were not inclined to continue his training as a driver-salesman, nevertheless, whether he, in fact, would be denied such training and would be deprived of an opportunity for advancement to the position of driver-salesman was completely speculative. As the Company offered to reinstate Paladino to the very same job he held at the time he was discharged and as Paladino refused to accept such reinstatement,I find that the discrimination against Paladino terminated on December 1 when he refused Respondent's offer to reinstatement.

4. *As to the refusal to recognize and to bargain with the Union*

When, on August 31, the Company received the Union's demand for recognition, the Union represented seven of the eight employees in the appropriate unit.[20] The next day Company president, Emmet Tracy, who had been absent from the plant on vacation continuously since July 18 rejected the request for recognition. No explanation, other than the matters set forth in his letter of September

[20] At the hearing the parties stipulated that all warehousemen and driver-salesmen employed at the Ferndale, Michigan, place of business of G.P.D., Inc., but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. In accordance with such stipulation I find said unit appropriate.

1, was offered as to the basis for Emmet Tracy's refusal to accept the Union's claim of majority. The reasons set forth in his September 1 letter to the Union, rather than revealing a reasonable basis for doubting the Union's majority, constituted a patent and unlawful attempt to dissuade the employees from supporting the Union. Respondent's defense to the Section 8(a)(5) charge herein is that it had a good-faith doubt that the Union represented a majority of the employees in the appropriate unit. "This good-faith doubt must have some reasonable basis and is not established merely by the employer's assertion of doubt of the majority." *N.L.R.B. v. Superior Sales, Inc.*, 63 LRRM 2197, 2203 (C.A. 8). No reasonable basis for doubt of the Union's majority on the part of the company has been shown. To the contrary, the conduct of the Respondent herein from the date it first received the Union's demand for recognition demonstrated a desire on its part to frustrate its employees' self-organizational aspirations and to undermine the Union's majority. The Company rejected the Union's bargaining request, not because it entertained a good-faith doubt as to the Union's majority, but because it rejected the collective-bargaining principle and was seeking time within which to evaporate the Union's strength. In such circumstances, therefore, the Company's refusal to recognize and bargain collectively with the Union constituted violations of Section 8(a)(1) and (5) of the Act.[40] However, the General Counsel has not proved that the Respondent engaged in further violations of Section 8(a)(5) by undertaking to bargain with employees individually in derogation of the Union's position as the duly designated representative of such employees.

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[40] *Joy Silk Mills, Inc. v. N.L.R.B.*, 85 NLRB 1263, enf'd, 185 F. 2d 732 (C.A.D.C.), cert. den., 341 U.S. 914.

IV. *The effect of the unfair labor practices upon commerce*

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The remedy*

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that the Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. For the reasons which are stated in *Consolidated Industries Inc.*, 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease and desist order.

Having found that Respondent, since September 1, 1965, unlawfully has refused to recognize and to bargain collectively with the Union, I shall, in accordance with established precedent,[21] recommend that the Company, upon request of the Union, bargain collectively with the Union.

Having found that the Respondent unlawfully discharged Joseph Paladino on September 8, 1965, I shall recommend that the Respondent make him whole for any loss of earnings he may have suffered by reason of the discrimination against him from said date until December 1, 1965 when Joseph Paladino refused to accept reinstatement to his

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[21] See *Preston Products Company, Inc.*, 158 NLRB No. 35, and cases therein cited.

former job by paying to him a sum of money equal to that which he normally would have earned between said dates, less his net earnings during such period. Having further found that the Respondent unlawfully discharged Michael Zamm on September 7, and unlawfully refused reinstatement to George Morris and Leonard W. Andrus when, as an unfair labor practice strikers they made applications for reinstatement on December 1, and 3, respectively, I shall recommend that the Respondent offer each of these employees immediate and full reinstatement to his former, or to a substantially equivalent, position, without prejudice to his seniority and other rights and privileges, and make each said employee whole for any loss of earnings he may have suffered by reason of the discrimination against him by paying to him a sum of money equal to that which he normally would have earned from the date of the discrimination against him to the date of Respondent's offer of reinstatement, less his net earnings during such period. The backpay provided herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F.W. Woolworth Co.*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. By the conduct set forth in section III, above, which has been found to be unlawful, the Company has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and

has thereby engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By failing and refusing, since September 1, 1965, to recognize and to bargain collectively with the Union as the duly designated exclusive collective bargaining representative of its employees in a unit appropriate for the purpose, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a)(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Joseph Paladino, Michael Zamm, Leonard W. Andrus and George Morris, thereby discouraging membership in the Union, Respondent has engaged, and is engaging, in unfair labor practice within the meaning of Section 8(a)(3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in any violations of the Act by reason of conduct alleged in the complaint to have constituted unfair labor practices except insofar as such conduct hereinabove has been found to have been unlawful.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of Law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby recommend that G.P.D., Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive collective bargaining representative of the employees in the following appropriate unit:

> All warehousemen and driver-salesmen employed at the Ferndale, Michigan, place of business of G.P.D., Inc., excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Discouraging membership in the aforesaid Union, or any other labor organization, by discriminating in regard to the hire, tenure of employment, or any other term or condition of employment of any of its employees.

(c) Threatening its employees with discharge or other reprisals if they should join, assist, or support the above-named Union or any other labor organization.

(d) Expressly or impliedly threatening its employees with a reduction in or loss of earnings or that their opportunities for employment with other employers will be reduced, if they join, assist, or support the above-named Union or any other labor organization.

(e) In any other manner, interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organization, to join or assist the above named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the above-described appropriate unit, and embody in a signed agreement any understanding reached.

(b) Offer to Michael Zamm, Leonard W. Andrus, and George Morris immediate and full reinstatement to their former or to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them in the manner set forth in the section of this Decision entitled "The remedy."

(c) Make Joseph Paladino whole for any loss of earnings he may have suffered between September 8, 1965, and December 1, 1965, by reason of Respondent's discrimination against him in the manner set forth in the section of this Decision entitled "The remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant to a determination of the amount of backpay due to said employees.

(e) Notify Michael Zamm, Leonard W. Andrus and George Morris, if presently serving in the Armed Forces of the United States, of their respective right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(f) Post at its place of business in Ferndale, Michigan, copies of the notice attached hereto and marked "Appendix."[39] Copies of such notice, to be furnished by the Regional Director for the Seventh Region of the Board, shall, after being duly signed by an authorized representative of the Respondent, be posted upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for the Seventh Region, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith."[40]

Dated at Washington, D.C.

Herbert Silberman
Trial Examiner

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[39] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[40] In the event that this Recommended Order is adopted by the Board this provision shall be modified to read, "Notify said Regional Director in writing, within 10 days of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL, upon request, bargain collectively with LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERCIA, IND., as the exclusive representative of our warehousemen and driver-salesmen, and if an understanding is reached, we will embody it in a signed agreement.

WE WILL NOT discourage membership in, or activities on behalf of, LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND., or any other labor organization, by discharging or otherwise discriminating against any of our employees in regard to their hire, tenure of their employment or any term or condition of their employment.

WE WILL NOT threaten any of our employees with discharge or other reprisals if they join, assist or support the above-named Union, or any other labor organization.

WE WILL NOT threaten any of our employees with a reduction in, or loss of, earnings or with any loss of opportunities to find employment with any other employer or company if they join, assist, or support the above-named Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL OFFER Michael Zamm, Leonard W. Andrus and George Morris full reinstatement to their former or to substantially equivalent positions without prejudice to their seniority and other rights and privileges, and we will make them whole for any loss of earnings they may have suffered by reason of our unlawful discrimination against them.

WE WILL make whole Joseph Paladino for any loss of earnings he may have suffered by reason of our unlawful discrimination against him.

G.P.D. INC.
(Employer)

NOTE:—We will notify Michael Zamm, Leonard W. Andrus and George Morris, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226 (Tel. No. 226-3200).

APPENDIX F

ORDER

(Filed Aug. 11, 1970)

Before: Edwards, Celebrezze and McCree, Circuit Judges

On petition to review and set aside an order of the National Labor Relations Board and cross-application for enforcement of its order;

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for review is denied and the Board's order is enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.